No. 14-1504

Title:	Robert J. Wittman, et al., Appellants v. Gloria Personhuballah, et al.
Docketed:	June 22, 2015
Linked with 15A724	
Lower Ct:	United States District Court for the Eastern District of Virginia
Case Nos.:	(3:13cv678)
Decision Date:	June 5, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Jun 22 2015	Statement as to jurisdiction filed. (Response due July 22, 2015)
Jul 22 2015	Motion to dismiss or affirm filed by appellees Gloria Personhuballah, and James Farkas.
Jul 22 2015	Motion to affirm filed by appellees Virginia State Board of Elections.
Aug 4 2015	Reply of Appellants opposing motions to dismiss or affirm filed. (Distributed)
Aug 5 2015	DISTRIBUTED for Conference of September 28, 2015.
Sep 28 2015	The parties are directed to file supplemental briefs addressing the following question: Whether appellants have standing under Article III of the United States Constitution. The briefs, not to exceed 15 pages each, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before Tuesday, October 13, 2015. Reply briefs, not to exceed 10 pages each, are to be filed with the Clerk and served upon opposing counsel on or before Tuesday, October 20, 2015.
Oct 13 2015	Supplemental brief of appellees Gloria Personhuballah, and James Farkas filed.
Oct 13 2015	Supplemental brief of appellee Virginia State Board of Elections filed.
Oct 13 2015	Supplemental brief of appellants Robert J. Wittman, et al., filed.
Oct 20 2015	Reply brief on standing of appellees Gloria Personhuballah and James Farkas filed.
Oct 20 2015	Reply brief on standing of appellants Robert J. Wittman, et al., filed. (Distributed)
Oct 20 2015	Reply brief on standing of appellee Virginia State Board of Elections filed. (Distributed)
Oct 21 2015	DISTRIBUTED for Conference of November 6, 2015.
Nov 9 2015	DISTRIBUTED for Conference of November 13, 2015.
Nov 13 2015	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. In addition to the questions presented by the jurisdictional statement, the parties are directed to brief and argue the following question: Whether Appellants lack standing because none reside in or represent the only congressional district whose constitutionality is at issue in this case.
Dec 28 2015	Brief of appellants Robert J. Wittman, et al., Appellants filed.
Dec 28 2015	Joint appendix filed (3 Volumes). {Statement of costs filed)
Jan 4 2016	Brief amici curiae of Alabama and Texas filed.
Jan 12 2016	Application (15A724) for a stay pending appeal, submitted to The Chief Justice.

Jan 14 2016	Response to application (15A724) requested by The Chief Justice, due Thursday, January 21, 2016, by 4 p.m. EST.
Jan 21 2016	Response to application from respondent Virginia State Board of Elections, et al. filed.
Jan 21 2016	Response to application from respondent Gloria Personhuballah and James Farkas filed.
Jan 21 2016	Motion for leave to file amicus brief and motion for leave to file brief pursuant to Rule 33.2 filed by Virginia State Conference of the NAACP.
Jan 22 2016	Reply of applicant Robert J. Wittman, et al., Appellants filed.
Jan 27 2016	Brief of appellees Gloria Personhuballah and James Farkas filed.
Jan 27 2016	Brief of appellees Virginia State Board of Elections, et al. filed.
Jan 29 2016	SET FOR ARGUMENT ON Monday, March 21, 2016
Feb 1 2016	Application (15A724) referred to the Court.
Feb 1 2016	Application (15A724) denied by the Court.
Feb 2 2016	Motion for divided argument and enlargement of time for oral argument filed by State appellees.
Feb 3 2016	Brief amicus curiae of United States filed.
Feb 3 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 3 2016	Brief amici curiae of Campaign Legal Center, et al. filed.
Feb 3 2016	Brief amicus curiae of The Lawyers' Committee for Civil Rights Under Law filed.
Feb 3 2016	Brief amicus curiae of Virginia State Conference of the NAACP filed.
Feb 3 2016	Brief amicus curiae of OneVirginia2021: Virginians for Fair Redistricting filed.
Feb 4 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the appellees Gloria Personhuballah and James Farkas.
Feb 8 2016	Record requested from the U.S.D.C. Eastern Dist. of VA. Richmond Div.
Feb 10 2016	CIRCULATED.
Feb 12 2016	Record received from the U.S.D.C. Eastern Dist. of Virginia is electronic and located on PACER, with the exception of 1 Box.
Feb 26 2016	Reply of appellants Robert J. Wittman, et al. filed. (Distributed)
Feb 29 2016	Motion for divided argument and enlargement of time for oral argument filed by State appellees GRANTED and the time is divided as follows: 35 minutes for appellants, 10 minutes for State appellees, 15 minutes for private appellees, and 10 minutes for the Solicitor General.
Feb 29 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 10 2016	Record received again from the U.S.D.C. Eastern District of Virginia. (1 Envelope)
Mar 21 2016	Argued. For appellants: Michael A. Carvin, Washington, D.C. For the State appellees: Stuart A. Raphael, Solicitor General of Virginia, Richmond, Va. For the private appellees: Marc E. Elias, Washington, D.C. For United States as amicus curiae in support of appellees: Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D.C.
Mar 25 2016	Letter, dated March 25, 2016, received from counsel for the appellants Robert J. Wittman, et al. filed. (Distributed)
May 23 2016	Appeal dismissed. Breyer, J., delivered the opinion for a unanimous Court.
Jun 24 2016	JUDGMENT ISSUED
Jul 18 2016	Record from U.S.D.C. Eastern District of Virginia has been returned.

14-1504

No. 14-___

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

On remand from this Court, the two-judge majority below again held that Virginia Congressional District 3, which perpetuates a district created as a *Shaw v. Reno* remedy, now violates *Shaw*. The majority, however, never found that "race *rather than* politics" predominates in District 3, or required Plaintiffs to prove "at the least" that the General Assembly could have "achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the Enacted Plan. *Easley v. Cromartie*, 532 U.S. 234, 243, 258 (2001) (emphasis original). Instead, the majority held that race predominated because the legislative sponsor of the redistricting plan correctly noted that Section 5 of the Voting Rights Act prohibited "retrogression [of] minority influence" in District 3, and that this federal-law mandate was "paramount" over "permissive" state-law traditional districting principles. J.S. App. 2a. Judge Payne dissented because the majority failed to show that Plaintiffs had carried their "demanding burden" to prove that race predominated in the drawing of District 3. *Id.* 47a.

The questions presented are:

1. Did the court below err in failing to make the required finding that race rather than politics predominated in District 3, where there is no dispute that politics explains the Enacted Plan?

2. Did the court below err in relieving Plaintiffs of their burden to show an alternative plan that achieves the General Assembly's political goals, is comparably consistent with traditional districting

principles, and brings about greater racial balance than the Enacted Plan?

3. Regardless of any other error, was the court below's finding of a *Shaw* violation based on clearly erroneous fact-finding?

4. Did the majority err in holding that the Enacted Plan fails strict scrutiny because it increased District 3's black voting-age population percentage above the benchmark percentage, when the undisputed evidence establishes that the increase better complies with neutral principles than would reducing the percentage and no racial bloc voting analysis would support a reduction capable of realistically securing Section 5 preclearance?

PARTIES

The following were parties in the Court below:

Plaintiffs:

Dawn Curry Page (dismissed via stipulation Apr. 9, 2014)

Gloria Personhuballah

James Farkas

Defendants:

Virginia State Board Of Elections (dismissed via stipulation Nov. 21, 2013)

Kenneth T. Cuccinelli, II, Attorney General of Virginia (dismissed via stipulation Nov. 21, 2013)

Charlie Judd, Chairman of the Virginia State Board of Elections

Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections

Don Palmer, Secretary of the Virginia State Board of Elections

Intervenor-Defendants:

Current and former Virginia Congressmen Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF AUTHORITIES vi

JURISDICTIONAL STATEMENT 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. District 3: A *Shaw* Remedy 5

B. The Enacted Plan 6

C. Plaintiffs' Lawsuit 7

REASONS FOR NOTING PROBABLE JURISDICTION 8

I. THE MAJORITY FAILED TO APPLY *ALABAMA* AND *EASLEY* 8

II. THE MAJORITY ERRED IN FAILING TO REQUIRE PROOF THAT RACE RATHER THAN POLITICS PREDOMINATED 16

III. THE MAJORITY ERRED IN FAILING TO APPLY THE *EASLEY* STANDARD 24

IV. THE MAJORITY CLEARLY ERRED IN FINDING A *SHAW* VIOLATION 31

TABLE OF CONTENTS
(continued)

Page

V. THE MAJORITY MISAPPLIED THE NARROW TAILORING REQUIREMENT 33

CONCLUSION 37

APPENDIX A: Opinion of the Eastern District of Virginia (June 5, 2015) 1a

APPENDIX B: Order of the Eastern District of Virginia (June 5, 2015) 94a

APPENDIX C: Amendment XIV of U.S. Constitution 96a

APPENDIX D: 52 U.S.C. § 10304 ..... 98a

APPENDIX E: Notice Of Appeal (June 18, 2015) 103a

TABLE OF AUTHORITIES

Page(s)

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 22

Ala. Leg. Black Caucus v. Ala.,
135 S. Ct. 1257 (2015) ..... *passim*

Bush v. Vera,
517 U.S. 952 (1996) 35, 36

Colleton Cnty. Council v. McConnell,
201 F. Supp. 2d 618 (D.S.C. 2002) 22

Easley v. Cromartie,
532 U.S. 234 (2001) ..... *passim*

Fletcher v. Lamone,
831 F. Supp. 2d 887 (D. Md. 2011) 17

Georgia v. Ashcroft,
539 U.S. 461 (2003) 35

Hunt v. Cromartie,
526 U.S. 541 (1999) 16, 25

Miller v. Johnson,
515 U.S. 900 (1995) 2, 27

Moon v. Meadows,
952 F. Supp. 1141 (E.D. Va. 1997) 5, 27

Shaw v. Hunt,
517 U.S. 899 (1996) 21, 22, 23, 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Shaw v. Reno,
509 U.S. 630 (1993) ..... *passim*

Tenney v. Brandhove,
341 U.S. 367 (1951) 25

Wilkins v. West,
264 Va. 447 (2002) 6, 27, 29

STATUTES

28 U.S.C. § 1253 1

Va. Code Ann. § 24.2-30 29

JURISDICTIONAL STATEMENT

Appellants Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf appeal the three-judge court's opinion and order holding that Virginia Congressional District 3 violates *Shaw v. Reno*.

OPINIONS BELOW

The opinion of the three-judge court of the Eastern District of Virginia (J.S. App. A) is reported at 2015 WL 3604029 (E.D. Va. June 5, 2015). The court's order (J.S. App. B) is unreported.

JURISDICTION

This Court vacated and remanded the three-judge court's first judgment in this case. *Cantor v. Personhubballah*, No. 14-518 (Mar. 30, 2015). The three-judge court's opinion and order on remand issued on June 5, 2015. J.S. App. A-B. Appellants filed their notice of appeal on June 18, 2015. J.S. App. E. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Section 5 of the Voting Rights Act ("VRA"), which are reproduced at J.S. App. C-D.

STATEMENT

Because of the "presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the

basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Thus, to prove a racial gerrymander under *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), plaintiffs bear the "demanding" burden, *Easley v. Cromartie*, 532 U.S. 234, 241 (2001), to "prove that the legislature subordinated *traditional race-neutral districting principles*"—including the "offsetting traditional race-neutral districting principles" of "incumbency protection" and "political affiliation"—to "racial considerations," *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1270 (2015) (emphasis original). And because "race and political affiliation" are often "highly correlated," plaintiffs must show that "race *rather than* politics" caused the challenged subordination of traditional principles. *Easley*, 532 U.S. at 242-43 (emphasis original).

In other words, *Shaw* plaintiffs must show a *conflict* between race and traditional principles, including politics, that the legislature resolved by redistricting in a way that sacrificed traditional principles to race. *See Ala.*, 135 S. Ct. at 1270. This is "what 'predominance' is about": proving that race had "a *direct and significant impact* on the drawing" of the challenged district that "*significantly affect[ed]*" and "*change[d]*" its boundaries compared to what they would have been if race had not subordinated traditional principles. *Id.* at 1266, 1270-71 (emphases added).

This Court, moreover, has made painstakingly clear *how* plaintiffs must discharge their heavy *Shaw* burden. Plaintiffs must isolate race as the explanatory variable by adducing an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred

"traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. *Easley*, 532 U.S. at 258.

The two-judge majority below failed to apply these requirements. In so doing, the majority turned the Legislature's equal treatment of majority-black Congressional District 3 ("Enacted District 3")—which perpetuated a *Shaw remedy*—into racial discrimination and a *Shaw violation*. The majority thus held that the Legislature violated *Shaw* even though it expressly found that the Legislature drew "the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5." J.S. App. 37a.

The majority's fundamental error is particularly egregious because it *conceded* that "partisan politic[s]" and "a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3. *Id.* 31a. Moreover, in a series of concessions the majority studiously ignores, Plaintiffs' only witness, expert Dr. Michael McDonald, admitted that it would have made "perfect sense" for the Legislature to adopt Enacted District 3 for *political* reasons even if every affected voter "was *white*." Trial Tr. 128 (emphasis added) ("Tr."). That is because—according to Dr. McDonald—the Republican-authored Enacted Plan's trades involving District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts from which "[y]ou could infer" a "political purpose." *Id.* 122, 128. These concessions comported with *all* contemporaneous statements—including Dr. McDonald's pre-litigation law review article—universally describing the Enacted Plan *not* as a

racial gerrymander, but as a "political gerrymander" that created "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; J.S. App. 48a-53a, 70a.

Moreover, in concessions the majority again disregards, Plaintiffs acknowledged that their Alternative Plan fails the *Easley* standard. Dr. McDonald admitted that the Alternative Plan "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" in District 3, Tr. 172-73, so it does not achieve "significantly greater racial balance" than the Enacted Plan, *Easley*, 532 U.S. at 258. Dr. McDonald also agreed that the Alternative Plan undermines the Legislature's "political goals," Tr. 180, because it transforms District 2, a 50/50 district represented by a Republican, into a "heavily Democratic" district, *id.* 119, 152-53, 184. And Dr. McDonald acknowledged that the Alternative Plan performs "significant[ly]" *worse* than the Enacted Plan on the Legislature's race-neutral incumbency-protection and core-preservation priorities. *Id.* 422-23.

Unable to find a *Shaw* violation within the clear parameters delineated by this Court, the majority held that race predominated because the Enacted Plan's sponsor correctly noted that Section 5 of the VRA prohibited "retrogression [of] minority influence" in District 3, and that this federal-law mandate was "paramount" over "permissive" state-law traditional principles. J.S. App. 2a. But on this view, *every* legislative or judicial redistricting in a jurisdiction covered by the VRA would automatically constitute a *prima facie Shaw* violation, because they all reflect the Supremacy Clause truism that the

federal VRA is superior to state-law principles. The majority's approach thus would improperly relieve *Shaw* plaintiffs of their demanding burden by turning Section 5 compliance from a compelling interest sufficient to *justify* racial subordination into a direct *admission* of such subordination.

Finally, although it is irrelevant because District 3 does not trigger strict scrutiny, the majority erred in concluding that the Enacted Plan fails strict scrutiny because the Legislature had "good reasons to believe" that the Plan was appropriate to comply with Section 5—indeed, it was the *best* way to comply while *minimizing* conflict with race-neutral principles. *Ala.*, 135 S. Ct. at 1274.

The majority's invalidation of Enacted District 3 contravenes this Court's precedents, and its order that the Legislature enact a remedy within three months should be reversed. Otherwise, the Legislature faces the prospect of overhauling Virginia's only majority-black congressional district based on a two-judge opinion that invalidates *equal* treatment of that district and endorses an Alternative Plan that concededly *discriminates*. The Court should note probable jurisdiction or summarily reverse.

A. District 3: A *Shaw* Remedy

District 3 was created as Virginia's only majority-black congressional district in 1991. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court), *summ. aff'd*, 521 U.S. 1113 (1997). In 1997, a three-judge court invalidated that version of District 3 under *Shaw* and ordered the Legislature to enact "a new redistricting plan" that "conforms to all

requirements of law, including the Constitution." *Id.* at 1151.

The Legislature adopted a remedial plan with 50.47% black voting-age population ("BVAP") in District 3. Pl. Ex. 22 at 3. That version was not challenged under *Shaw* and was used for the 1998 and 2000 elections.

The Legislature enacted a new plan (the "Benchmark Plan") in 2001. Benchmark District 3 was substantially similar to the 1998 version, Int.-Def. Exs. 6-7, and had a 53.1% BVAP, Pl. Ex. 27 at 14.

The Benchmark Plan was not challenged under *Shaw*, even though Virginia voters mounted *Shaw* challenges to the 2001 House of Delegates and Senate plans. *Wilkins v. West*, 264 Va. 447 (2002). Benchmark District 3 was surrounded by four districts—Districts 1, 2, 4, and 7—which elected Republicans in 2010. That year, first-time Republican Congressman Rigell beat a Democratic incumbent in District 2, a closely divided district politically that had elected a Democrat in 2008 and a Republican in 2004 and 2006. Tr. 118-19, 258-61.

B. The Enacted Plan

The 2010 Census revealed population shifts that required a new congressional districting plan. In 2011, the Democratically-controlled Virginia Senate approved criteria for the plan, including achieving "equal population" and VRA compliance; respecting "communities of interest"; and accommodating "incumbency considerations." Pl. Ex. 5 at 1-2.

After Republicans gained control of the Legislature in 2012, Republican Delegate Bill Janis sponsored

the bill that became the Enacted Plan. The Enacted Plan treated District 3 the same way as the majority-white districts by preserving its core and making relatively minimal changes to benefit the incumbents in District 3 and adjacent districts. Tr. 121-28, 258-61; Int.-Def. Exs. 20-21.

As Dr. McDonald testified, Enacted District 3 "closely resembles" Benchmark District 3. Tr. 171. It has a 56.3% BVAP. Pl. Ex. 6 at 5. The Enacted Plan received preclearance and was used in the 2012 and 2014 elections. Int.-Def. Ex. 1.

C. Plaintiffs' Lawsuit

Plaintiffs did not file suit until October 2013, after this Court's decision in *Shelby County v. Holder*. Compl. ¶ 4. Plaintiffs initially posited that, "in the wake of *Shelby County*, Section 5 cannot justify the use of race" in the pre-*Shelby County* Enacted Plan. *Id.* ¶ 43. The eight Appellants then serving as members of Congress intervened as Intervenor-Defendants. *See* J.S. App. 3a-4a.

Plaintiffs eventually shifted to the theory that the Enacted Plan was not narrowly tailored to comply with Section 5. *Id.* 36a-38a. They produced an Alternative Plan that replicates most of the Enacted Plan's trades involving District 3, but shifts the boundary between Districts 2 and 3. Tr. 157. Alternative District 3 has a 50.2% BVAP. *Id.* 172.

After trial, Judge Duncan, joined by Judge O'Grady, held that Enacted District 3 is an unconstitutional racial gerrymander. Mem. Op. (DE 109). Judge Payne dissented. *See id.* The eight original Appellants appealed to this Court, which vacated and remanded for further consideration in

light of *Alabama*. *See Cantor v. Personhubballah*, No. 14-518.

On remand, the three-judge court granted intervention to Representatives Brat and Comstock, who had been elected to Congress during the appeal. The majority thereafter issued a substantially similar opinion and ordered the Legislature to adopt a remedy by "September 1, 2015." J.S. App. 94a. Judge Payne again dissented. *See id.* 45a.

REASONS FOR NOTING PROBABLE JURISDICTION

It is undisputed that the Legislature preserved majority-black District 3 in the same way that it preserved all other districts in the Commonwealth, which are majority-white. The Legislature preserved all districts to accomplish the contemporaneously-stated purposes of maintaining the partisan make-up of Virginia's congressional delegation, protecting incumbents, and preserving the cores of all districts. The majority thus found a *Shaw* violation even though the Legislature indisputably did *not* "subordinate" its political goals or preferred traditional principles to race, but, instead, treated the majority-black district *the same* as the majority-white districts. *Ala.*, 135 S. Ct. at 1270.

The majority arrived at this untenable holding by ignoring the Court's directives and committing clear legal and factual errors. The Court should summarily reverse or note probable jurisdiction.

I. THE MAJORITY FAILED TO APPLY *ALABAMA* AND *EASLEY*

Shaw plaintiffs bear the demanding burden to prove that the legislature "subordinated" traditional

principles—including the "offsetting" "race-neutral districting principles" of "incumbency protection" and "political affiliation"—to "racial considerations." *Ala.*, 135 S. Ct. at 1270. Since "race" cannot even theoretically "subordinate" a traditional principle absent a *conflict* between the two, plaintiffs' threshold burden is to establish such a conflict. *Id.* In other words, *Shaw* can be violated only where race had "a *direct and significant impact* on the drawing" of the challenged district that "*significantly affect[ed]*" and "*change[d]*" the district's boundaries compared to what they would have been if race had not subordinated traditional principles. *Id.* at 1266, 1270-71 (emphases added). But such a racially-driven "impact" is possible only if a conflict between race and neutral principles exists because, absent such a conflict, race and traditional principles independently would have led the legislature to adopt the same redistricting plan. *Id.*

This requirement to show a conflict between race and traditional principles was particularly obvious and dispositive here. The majority *conceded* that "partisan politic[s]" and "a desire to protect incumbents" "inarguably" "played a role in drawing" the Enacted Plan in this "mixed motive suit." J.S. App. 31a. It therefore was particularly important to show that the alleged "racial" motive subordinated these neutral factors and thereby "changed" the District's boundaries, in order to "prove" that "race *rather than* politics" was the "predominant factor" in subordinating traditional principles. *Easley*, 532 U.S. at 242-43 (emphasis original).

1. Yet, remarkably, the majority found a *Shaw* violation without finding any *inconsistency* between

race and politics or protecting incumbents, much less that race predominated over these race-neutral factors. The reason there is no such finding is because none is possible: the *undisputed* evidence established that preserving the core of District 3, and all minor adjustments to it, directly furthered the Legislature's political and incumbency-protection goal of maintaining 8 Republican incumbents. Thus, even if the Legislature had a racial reason for preserving and making minor adjustments to District 3, it also had coextensive *non*-racial reasons. Since these race-neutral reasons *coincided* with any racial reason, it is not possible that race *subordinated* them. Race did not "affect" District 3's shape or demographics because the same shape and demographics would have resulted from politics and incumbency protection.

2. The majority also ignored *Easley*'s specific directive on *how* plaintiffs must prove that race predominated over non-racial factors. *Shaw* plaintiffs must produce an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred "traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. *Id.* at 258. The reason for this requirement is obvious. If plaintiffs cannot produce an alternative free from racial predominance that achieves the legislature's political (and other traditional) objectives, they have failed to prove that politics is not the cause of the district's shape and demographics. If the political goals can reasonably be accomplished only through the district(s) chosen by the legislature, race cannot be the predominant factor because the district would have been created

even absent racial considerations, in order to accomplish the desired political result.

The majority, however, found a *Shaw* violation even though Plaintiffs produced no such alternative. To the contrary: Plaintiffs' majority-black Alternative District 3 concededly contravenes the Legislature's political objectives by converting a Republican incumbent's adjacent district into a "heavily Democratic" one; concededly contravenes the Legislature's race-neutral incumbency-protection and core-preservation priorities; and concededly embodies the racial flaws that purportedly infected the enacted district—in Dr. McDonald's words, "subordinat[ing] traditional districting principles to race" to achieve a "50%" black "quota." Tr. 119, 153, 172-73, 180. Plaintiffs' failure to show that the Legislature's political objectives could be accomplished through *any* alternative means (much less a non-subordinating alternative) establishes that Enacted District 3 is the *only* means of accomplishing them (and therefore that politics necessarily predominates over race).

3. The majority nonetheless rested its finding that race "predominated" on the unremarkable fact that "race" was a *higher-ranked* criterion than the neutral criteria. J.S. App. 2a, 21a-23a. Specifically, the majority found that Delegate Janis's correct recitation that Section 5 prohibited "retrogression [of] minority voting influence" in District 3 was a racial purpose. *Id.* 2a, 21a-23a. It then opined that this "racial" purpose "predominated" because Janis correctly noted that this *federal* mandate was "nonnegotiable" and "paramount," while *state-law* neutral principles were merely "permissive." *Id.* 2a,

21a-23a. This tautology is facially erroneous and would automatically invalidate all redistricting in Section 5 jurisdictions, because *every* such jurisdiction acknowledges the truism that Section 5's *federal mandate* is paramount to *all* traditional principles, since all are "permissive."

First, even if the Legislature had announced that achieving a specific "racial balance" in District 3 was its paramount goal for reasons *unrelated* to Section 5, this would not suggest that it subordinated neutral principles to race. *Easley*, 532 U.S. at 253. Such "direct evidence" of a desired "racial balance" "say[s] little or nothing about whether race played a *predominant* role comparatively speaking." *Id.* (emphasis original). That comparative predominance analysis can only be resolved under the *Easley* methodology eschewed by the majority; *i.e.*, by determining whether plaintiffs have eliminated politics and traditional principles as explanatory variables by showing that those objectives conflicted with achieving the desired "racial balance" and could be accomplished through an alternative with a "significantly" different "racial balance."

Particularly since race and politics are so "highly correlated" in Virginia (and elsewhere), it is quite plausible that the BVAP resulting in Enacted District 3 directly furthers the Legislature's political interests and would be pursued absent any "racial" motive. If, as here, Plaintiffs do not satisfy their burden of negating that plausible scenario, they have not shown that "race rather than politics" explains the district, *regardless* of whether the Legislature rank-ordered "race" above "politics." It does not matter whether the racial factor is ranked above the non-

racial reason where, as here, they both head in the same direction, since there will be no need to choose *between* these *non-conflicting* factors. Indeed, finding that "race"—*i.e.*, Section 5 compliance—"predominated" because it was a "nonnegotiable" criterion "superior" to "permissive" neutral principles is just as illogical as finding that "race" did *not* predominate because the neutral "nonnegotiable" *constitutional* requirement of population equality is "superior" to Section 5's *statutory* requirements. *See Ala.*, 135 S. Ct. at 1270-72.

Second, it is particularly illogical and threatening to minority voting rights to engage in this rank-ordering analysis where, as here, race is ranked higher solely because the federal Section 5 mandate is "nonnegotiable" and superior to "permissive" principles. Under the majority's logic, every court or legislature that acknowledges the Supremacy Clause truism that the federal VRA is "paramount" to all "permissive" traditional principles is guilty of racial predominance in violation of *Shaw*. Thus, every redistricting in every jurisdiction with a cognizable minority population would be subject to strict scrutiny because all judicial and legislative line-drawers in those jurisdictions acknowledge that the race-conscious VRA mandates are "nonnegotiable" and "paramount" to permissive race-neutral principles. This, of course, is not the rule because, again, a *prima facie Shaw* violation requires showing (at a minimum) that these race-conscious VRA requirements *conflict* with neutral principles.

Third, the majority's analysis is at war with this Court's treatment of VRA compliance under *Shaw*. The Court treats VRA compliance as a governmental

interest so compelling that it even justifies subordination of neutral principles to race. J.S. App. 37a-38a. This rule recognizes that legislatures must be provided some way of complying with the potentially conflicting demands of the race-conscious VRA and the race-neutral Fourteenth Amendment. *See Ala.*, 135 S. Ct. at 1274. The majority turned this principle on its head. The majority squarely found, as a factual matter, that "the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5." J.S. App. 37a. But it improperly converted this compelling interest sufficient to *justify* racial subordination into a direct *admission* of such subordination.

Far from reconciling the conflicting demands of the VRA and the Fourteenth Amendment, the majority's approach places them in irreconcilable conflict by treating any effort at VRA compliance as a *prima facie* Equal Protection violation, even if such compliance causes no departure from what race-neutral policies would have dictated. Importantly, this is true even if the legislature narrowly tailors its plan to achieve the compelling interest of VRA compliance. Such a "narrowly tailored" plan has the same *purpose* as the Legislature here—Section 5 compliance—and it is this "racial" purpose the majority says "must" be subjected to "strict scrutiny." *Id.* 36a-40a. Thus, even a legislature that correctly understands and implements Section 5's non-retrogression requirements has committed a *prima facie* violation, because Section 5 "predominates" over voluntary neutral principles. Under this regime, then, all *Shaw* cases bypass the demanding *prima facie* showing and turn entirely on whether

defendants have satisfied the "narrowly tailored" burden.

4. Finally, the majority violates this Court's precedent by converting *Shaw*'s racial-equality command into a requirement that minority districts be treated differently and worse than majority-white districts. It is undisputed that majority-black District 3 was treated the same as all of the other, majority-white congressional districts—the Enacted Plan makes only minor changes to district cores and those changes politically benefit incumbents. The fact that all majority-white districts not subject to Section 5 were preserved just like District 3 is virtually conclusive proof that Section 5's requirement to preserve minority voting strength was not inconsistent with the neutral principles governing all districts. Under the majority's backward logic, however, the Legislature was precluded from doing the same incumbency protection in District 3 that it voluntarily did in the majority-white districts, because Section 5's preservation command "predominated" over this "permissive" preservation policy.

Accordingly, the majority requires treating minority districts and incumbents worse than their white counterparts, because it precludes preserving such Section 5-protected districts in the same way as majority-white districts not protected by Section 5. Needless to say, the Fourteenth Amendment and *Shaw* cannot require treating certain districts worse because of their predominantly minority racial composition. *See Ala.*, 135 S. Ct. at 1270.

The majority then exacerbated this perversion of *Shaw* by using Plaintiffs' Alternative Plan—which

concededly "subordinates traditional districting principles" to achieve a 50% black "quota"—as the principal proof that District 3 shared these defects, without evaluating whether a district where race did *not* predominate would have equally complied with non-racial goals. Thus, the majority converts the *Shaw* inquiry from whether a majority-minority district subordinated traditional principles relative to one not infected by race into a "beauty contest" between two majority-minority districts where the "winner" is the one that (marginally) better complies with the *court's* view of proper districting principles and *Plaintiffs'* political goals, although it is concededly worse in terms of the Legislature's preferred race-neutral principles. This obviously does nothing to further racial neutrality, but simply substitutes one racially-driven district that contravenes the Legislature's political desires for one that furthers them.

II. THE MAJORITY ERRED IN FAILING TO REQUIRE PROOF THAT RACE RATHER THAN POLITICS PREDOMINATED

A more detailed discussion of the facts confirms the majority's error in finding a *Shaw* violation without finding that race conflicted with "incumbency protection" and "political affiliation," *Ala.*, 135 S. Ct. at 1270, and that "race *rather than* politics" predominates in Enacted District 3, *Easley*, 532 U.S. at 243 (emphasis original); *see also Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (legislature may subordinate traditional principles to gerrymander (or support) Democrats "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact."

(emphasis original)); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901 (D. Md. 2011) (three-judge court) (summary judgment under *Shaw* because "plaintiffs have not shown that the State moved African-American voters from one district to another because they were African-American and not simply because they were Democrats"), *summ. aff'd*, 133 S. Ct. 29 (2012).

The majority's eliding of these requirements is especially impermissible because it *acknowledged* that "partisan considerations" and "a desire to protect incumbents" "inarguably" "played a role" in this "mixed motive suit," J.S. App. 31a, thereby underscoring the need to analyze *which* motive predominates, *Ala.*, 135 S. Ct. at 1270.

The majority, however, conducted no such analysis, finding instead that politics *might* not have predominated because the Legislature's acknowledged political purposes "*need not* in any way refute the fact that race was the legislature's predominant consideration." J.S. App. 32a (emphasis added). But the truism that politics "need not" trump race is no substitute for the requisite finding that it *did not*, particularly since consideration of *race* "need not in any way refute the fact that" *politics* was "the legislature's predominant consideration." *Id.* Indeed, that race and politics are invariably present in redistricting and "highly correlated" is precisely why this Court requires plaintiffs to prove *which* factor predominated. *Easley*, 532 U.S. at 242.

In all events, the majority *could not* have made the required finding. It is *undisputed* that:

- All contemporaneous commentators—including Plaintiffs' expert—described the

Enacted Plan as a "political gerrymander" that maintained "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; Tr. 129, 137; J.S. App. 48a-53a, 66a-71a;

- *Every* piece of electoral data confirms that the Enacted Plan has this "clear political *effect*." Tr. 122-128 (emphasis added);
- *Plaintiffs'* expert agreed that it would have made "perfect sense" to adopt the Enacted Plan for *political* reasons even if every affected voter "was white." *Id.* 128;
- The Legislature's treatment of District 3—preserving its core with minimal politically-motivated changes—was *identical* to its treatment of the majority-white districts;
- Delegate Janis repeatedly stated that protecting incumbents and perpetuating the 8-3 split were the Enacted Plan's goals;
- Janis disclosed that the plan uniformly followed incumbents' "specific and detailed recommendations" for their own districts. J.S. App. 56a;
- No alternative plan preserves the 8-3 split and protects all incumbents; and
- Any effort to significantly adjust District 3's racial composition would spread Democrats into the adjacent districts and harm Republican incumbents (as well as black electoral opportunities in District 3).

1. The undisputed evidence more than confirms Dr. McDonald's concessions about the Enacted Plan's political effect—and underscores that the majority

could *not* have found racial predominance. The 2010 elections resulted in the 8-3 partisan split—and *preserving* District 3's core was needed to freeze that split. Also, the relatively minor *changes* to District 3 were all "politically beneficial" to the Republican incumbents in adjacent districts because they moved Democrats out of, and Republicans into, those districts. Tr. 122-28.

For example, prior to the Enacted Plan, District 2 represented by Republican Congressman Rigell was a closely divided district where Barack Obama and John McCain each captured 49.5% of the vote in 2008. Int.-Def. Ex. 20. The Enacted Plan increased District 2's Republican vote share by 0.3%. *Id.* The same pattern adhered in the other Republican districts surrounding District 3: District 1 became 1% more Republican; District 4 became 1.5% more Republican; and District 7 became 2.4% more Republican. *Id.*

Moreover, District 3 increased by 3.2% in BVAP and 3.3% in Democratic vote share. *Id.* Thus, while the majority was technically correct that the trades with District 3 had a racial effect, J.S. App. 32a, it ignored that they had a clear and *identical political* effect. The areas moved between Districts 2 and 3 had approximately a 17% difference in Democratic vote share and an 18% difference in BVAP. Tr. 261. The areas moved between Districts 4 and 3 had a Democratic vote share difference of 33% and a BVAP difference of 34%. *Id.* 264. And in the areas moved between District 7 and District 3, the Democratic vote share and BVAP differences were approximately 49% and 50%, respectively. *Id.* 264-65. Accordingly, contrary to the majority's assertion, the Legislature's

plan here, just as in *Easley*, "furthered the race-neutral political goal of incumbency protection to the same extent as it increased the proportion of minorities within the district." J.S. App. 32a.

The fact that politics explains Enacted District 3 is unsurprising because Delegate Janis *expressly said so*, in a display of candor rarely seen among legislators engaged in redistricting. *See id.* 54a-62a. Delegate Janis said his overriding objective was "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election," when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008). *Id.* 55a. Accordingly, the Enacted Plan preserved "the core of the existing" districts. *Id.* Moreover, any minimal changes were not politically harmful to incumbents because Delegate Janis *adhered* to "the input of the existing congressional delegation, both Republican and Democrat," in how their districts should be drawn. Int.-Def. Ex. 9 at 14.

Delegate Janis candidly noted, "the district boundary lines were drawn in part on specific and detailed recommendations" from "each of the eleven members currently elected to [C]ongress," including Congressman Scott in District 3. *Id.* at 8. After the Enacted Plan was drawn, Delegate Janis "spoke[] with each" incumbent and "showed them a map of the lines." *Id.* "[E]ach member of the congressional delegation both Republican and Democrat has told me that the lines" conform to "the recommendations that they provided me, and they support the lines for how their district is drawn." *Id.* 9-10; Pl. Ex. 43 at 5-6, 13-14, 20-30, 38; J.S. App. 56a.

In light of this obvious political purpose and effect, *every* contemporaneous commentator—including Democratic opponents and Dr. McDonald—described the Enacted Plan as a "partisan gerrymander" that preserved the 8-3 split and "protected all incumbents." Int.-Def. Ex. 55 at 816; J.S. App. 55a-56a.

2. In the face of this extraordinary candor, the majority resorted to irrelevant nit-picking. It discounted Delegate Janis's statements on the unelaborated view that they are "rather ambiguous," and because Janis did not personally consider "partisan performance" statistics or show "the *entire* 2012 Plan" to incumbents. J.S. App. 33-34a (emphasis added). Janis, however, had no need to consider "partisan performance" statistics because the incumbents who effectively drew their own districts considered such performance, and their self-interested approval of their own districts added up to a *statewide* incumbency protection plan across "the entire" Enacted Plan. And his statements are not remotely "ambiguous" about a purpose to protect all incumbents, particularly since objective electoral data confirmed that the Plan would have precisely such an "effect" (as it did in 2012 and 2014).

3. Confronted with Delegate Janis's irrefutable admissions that politics drove the Enacted Plan and the absence of any "explicit admission of predominant racial purpose" (or any racial purpose), *id.* 91a, the majority sought to spin garden-variety statements into "concessions" analogous to those in *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (*Shaw II*). The majority contended that a racial purpose is shown by Janis's statements that "one of the paramount

concerns" was not to violate Section 5 by "retrogress[ing] minority voting influence" in District 3, and the Senate Criteria's recognition of the "priority" of such "mandatory" federal law over "permissive" state law. J.S. App. 2a, 8a, 21a-23a. But, as explained, *see supra* Part I, such routine acknowledgements of the Supremacy Clause and correct recitations of Section 5's requirements cannot constitute admissions to violating the Equal Protection Clause, lest *every* legislative and *judicial* redistricting, particularly in Section 5 jurisdictions, be subjected to strict scrutiny. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 636 (D.S.C. 2002) (three-judge court) (judicial redistricting must "not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); *Abrams v. Johnson*, 521 U.S. 74, 96 (1997).

Moreover, in *Shaw II*, the Section 5 submission acknowledged that the "*overriding* purpose was" to create "two congressional districts with effective black majorities," and the draftsman "testified that creating two majority-black districts was the 'principal reason'" for the plan. 517 U.S. at 906 (emphasis original). These racial considerations concededly subordinated traditional principles: the challenged district was "the least geographically compact district in the Nation," and the State initially contended that the district would offend "neutral districting principles." *Id.* at 906, 912-13. The *Shaw II* finding of racial predominance rested on this direct evidence not, as here, any acknowledgement of the need for Section 5 compliance. Nor could there have been any such acknowledgement in *Shaw II*, since Section 5's *non-*

retrogression mandate could not be violated by *failing to add* new majority-black districts. *Id.* at 913. Here, in contrast, it is undisputed that Section 5 did require non-retrogression in District 3. Similarly, unlike *Shaw II*, *preserving* District 3's shape and population directly furthers the Legislature's race-neutral core-preservation and incumbency-protection priorities *uniformly* applied statewide, while North Carolina's *creation* of a new district was *concededly* contrary to the traditional principles used elsewhere in the state, including "protecting incumbents." *Id.* at 907. Thus, at worst, in stark contrast to *Shaw II*, the references to mandatory non-retrogression here suggest that race was "a motivation," but not one conflicting with, much less predominating over, race-neutral goals. *Easley*, 532 U.S. at 241.[1]

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[1] The majority referred to two other pieces of putative "direct evidence," but neither is direct or evidence of racial predominance. *First*, the majority contended that defense expert John Morgan "confirmed that the legislature adopted" a 55% BVAP "floor" for Enacted District 3. J.S. App. 41a. If Mr. Morgan had said this, it would not reflect the Legislature's purpose because, as the majority itself notes, he "did not work with or talk to any members of the Virginia legislature" regarding the Enacted Plan. *Id.* 21a n.16. Anyway, Mr. Morgan never suggested any 55% quota; he simply noted that the *state* redistricting plan enacted in *2011* contained 55% BVAP districts and enjoyed bipartisan and biracial support, which provided the Legislature a strong basis for believing that a district with a similar BVAP, far from overconcentrating black voters, was a legitimate option for achieving Section 5 preclearance. *See id.* 66a-67a.

Second, the majority contorted into a defense "concession" a statement from Appellants' summary judgment brief describing *Plaintiffs'* concession that race was considered to achieve Section 5 *compliance*, thus foreclosing any finding that the Plan

III. THE MAJORITY ERRED IN FAILING TO APPLY THE *EASLEY* STANDARD

As explained, *see supra* Part I, the majority departed from *Easley* when it relieved Plaintiffs of the burden to produce an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred "traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. 532 U.S. at 258.

1. The majority offered no coherent rationale for violating *Easley*. *First*, it suggested that the *Easley* burden is not triggered unless the defense presents "overwhelming evidence" of a political explanation for the challenged plan, including "trial testimony by state legislators." J.S. App. 33a. But *Easley* "*generally*" requires *all* plaintiffs "at the least" to disprove politics where it highly correlates with race, 532 U.S. at 258 (emphasis added), not merely in certain circumstances depending on defendants' evidence; much less does it require "trial testimony by state legislators." The absence of any need for trial testimony is particularly obvious where, as here, the *contemporaneous* legislative history evinces a clear 8-3 incumbency-protection purpose, *see supra* Part II—which is presumably why *Plaintiffs* offered no legislator testimony to support their racial theory.

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was based on "an *improper* consideration of race." Int.-Def. Mem. 15 (emphasis added); J.S. App. 20a-21a. Even if the sentence could bear the majority's preferred reading, it was not uttered by Defendants, and *post hoc* litigation statements by strangers to the redistricting process are plainly irrelevant. J.S. App. 48a n.34.

Defendants obviously are not required to waive legislative privilege, *Tenney v. Brandhove*, 341 U.S. 367 (1951), to trigger the *Easley* burden, particularly if trial testimony would merely echo available contemporaneous statements. Indeed, such post-hoc testimony is far less probative of "the legislature's actual purpose" than statements that were "before the General Assembly when it enacted" the Plan. *Shaw II*, 517 U.S. at 908 n.4 & 910; *Hunt*, 526 U.S. at 549 (political data and expert testimony "more important" than after-the-fact legislator testimony).

Indeed, *Easley* in no way depended on legislator testimony to trigger this burden. 532 U.S. at 258. The page from *Easley* the majority cites does *not* refer to legislator testimony, but instead to the political explanation offered by "the State." *Id.* at 242. And that page emphasizes that the trial "was not lengthy and the key evidence consisted primarily of documents and expert testimony." *Id.* at 243. Similarly here, the record contains "overwhelming evidence," J.S. App. 33a—including documents, expert testimony, Dr. McDonald's concessions, and contemporaneous statements—proving a political explanation for the Enacted Plan.

Second, the majority blithely suggested that the dissent's criticism that Plaintiffs' Alternative Plan produced only a 7-4 Republican ratio "relies on an *assumption* that the legislature's objective was to create an 8-3 incumbency protection plan." *Id.* 16a n.12 (emphasis added). But the "assumption" that the Republican-controlled Legislature wanted to protect Republican incumbents is compelled by common sense and is the very assumption underlying *Easley*. *See* 532 U.S. at 242, 258. And it is not even

an "assumption" because Delegate Janis repeatedly disclosed this objective, every contemporaneous commentator (including Dr. McDonald) acknowledged it, and the Enacted Plan has the clear effect of maintaining the 8-3 split. *See* J.S. App. 48a-53a; 68a-71a.[2]

2. The majority's eschewing of the *Easley* standard is unsurprising because Plaintiffs' own concessions demonstrate that the Alternative Plan failed it. As noted, *see supra* Part I, Plaintiffs conceded that the Alternative Plan *both* "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" and undermines the Legislature's "political goals" of "an 8/3 incumbency protection plan," Tr. 172-73, 180. The Alternative Plan's reduction of District 3's BVAP to the "50%" "quota" turns District 2 from an evenly divided "49.5% percent Democratic" district into a 54.9% "heavily Democratic" district, creating a 7-4 partisan division. *Id.* 153; Int.-Def. Ex. 22; J.S. App. 88a. The Alternative Plan thus decreases District 3's BVAP by 6% not to eliminate its racial identifiability, but to increase District 2's Democratic vote share by 5.4%. J.S. App. 88a; Int-Def. Ex. 22. This is unsurprising, since the Alternative Plan was drafted by a "liberal" advocacy organization—and Plaintiffs' litigation is

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[2] The majority also said that Plaintiffs' *Easley* burden may be satisfied by something other than an "alternative *plan*." J.S. App. 16a n.12 (emphasis added). While this may theoretically be true, Plaintiffs' chosen alternative *is* a plan, and it is quite difficult to *envision* an "alternative" other than a plan, particularly since the majority does not identify such a theoretical, non-plan "alternative." *Id.*

being financed by the National Democratic Redistricting Trust. Tr. 272.

3. The Alternative Plan also fails *Easley*'s third prong because it is not as "consistent with traditional districting principles" as the Enacted Plan. 532 U.S. at 258. At the outset, the Alternative Plan fails this requirement because—as Dr. McDonald conceded—it "undermines" the two race-neutral principles that the Legislature prioritized above all others: politics and incumbency protection. Tr. 180. It was the province of the Legislature to "balance" its priorities against "competing" principles—and courts are not permitted to upset that balance in *Shaw* cases. *Miller*, 515 U.S. at 915; *Wilkins*, 264 Va. at 463-64.

Moreover, all other criticisms of the Enacted Plan's alleged departures from traditional principles *flowed from* the Legislature's prioritization of politics and incumbency protection. The Legislature pursued those goals by preserving the cores of all districts and making minimal changes to benefit incumbents. J.S. App. 55a. It therefore necessarily *perpetuated* any flaws in the shape and demographics inherited from the Benchmark Districts.

Moreover, preserving District 3's core made unusually good sense for the independent reasons that District 3 "conform[ed] to all requirements of law" when it was adopted as a *Shaw remedy*, *Moon*, 952 F. Supp. at 1151, had not been challenged under *Shaw* in the 2001 *Wilkins* case, and was politically beneficial to Republican incumbents, Tr. 122-28.

As Dr. McDonald conceded, the Enacted Plan performs "*significant[ly]*" better than the Alternative Plan on core preservation. *Id.* 422-23 (emphasis added). The Enacted Plan preserves between 71.2%

and 96.2% of the cores of all districts, and 83.1% of District 3's core. Int.-Def. Ex. 27. The Alternative Plan preserves only 69.2% of District 3's core, the lowest core-preservation percentage of any district in the Alternative or Enacted Plans. *Id.*; Tr. 422.

The majority missed these dispositive points entirely. Instead, the majority contended that the Enacted Plan did not sufficiently preserve District 3's core because it moved more than the bare minimum number of people needed to achieve population equality in that District (when unrealistically viewed without regard to the population needs of *other* districts). J.S. App. 28a. But the stated policy was not to make only those changes required by population equality, but to preserve the cores of districts (with minor swaps to bolster incumbents politically). It is undisputed that District 3 fulfilled those criteria as well as its majority-white counterparts, since more of its core was preserved than two such districts and the additional swaps bolstered incumbents. Int.-Def. Ex. 27; Tr. 122-28. In contrast, the Alternative Plan preserves *less* of the core of District 3 than of *every majority-white* district, *see* Int.-Def. Ex. 27, and moves more than *twice* as many people in and out of District 3 than the Enacted Plan, Pl. Ex. 29 at 8-9.

The majority further concluded that the Alternative Plan was superior to the Enacted Plan because it contained one fewer locality split. J.S. App. 27a-28a. But even that marginal improvement is accomplished "at the expense of" the *more important*, concededly motivating factors of politics and "protecting incumbents." *Id.* 89a. Moreover, Dr. McDonald agreed that "no principle" says that

avoiding locality splits is "more important than" incumbency protection or core preservation—and that it would have been "reasonable to choose the Enacted Plan over the Alternative Plan" if the Legislature preferred those principles over respecting localities. Tr. 222-23.

The Legislature's preference was more than reasonable. Although not insignificant, respecting localities has not been an important principle in Virginia for decades. The Virginia Constitution was amended in 1970 to *eliminate* respect for "political subdivisions" as a traditional principle. Int.-Def. Ex. 55 at 782. In 2000, the Legislature identified by statute certain important traditional principles; respecting localities was not included. Va. Code Ann. § 24.2-305. The Virginia Supreme Court, in a *Shaw* case, listed "preservation of existing districts" and "incumbency," but not respecting political boundaries, as traditional principles. *Wilkins*, 264 Va. at 464. Anyway, Dr. McDonald conceded that the Enacted Plan "scored highly" and outperformed the Benchmark Plan on locality splits, Tr. 138, further underscoring the reasonableness of the Legislature's trade-off of one fewer locality split for the increased incumbency protection and core preservation that advanced its political objectives.

4. The majority resorted to conjuring three traditional principles in an attempt to show that race predominated in Enacted District 3. *See* J.S. App. 24a-27a. As explained, however, these principles were all at best secondary to the Legislature's political, incumbency-protection, and core-preservation priorities which caused the alleged violations the majority identified. First, the majority

suggested that Enacted District 3 is not "compact," *id.* 24a, but any problems with its shape were *inherited* from the *Shaw* remedy and Benchmark Plan whose compactness had *never* been challenged, and *had* to be maintained under the uniform core-preservation and incumbency-protection principles applied to all other (majority-white) districts. Moreover, its compactness is not materially different than other districts because it scores only *.01* less than the second-least compact (and majority-white) district. *Id.* 77a-79a. Dr. McDonald conceded that these differences "are relatively small" and "not significant under any professional standard." Tr. 217. He also admitted that compactness measures like those the majority invoked are "inherently manipulable" and that there is no "professional standard" for judging compactness. *Id.*

Further, the majority described Enacted District 3 as somehow "non-contiguous" because it uses "water contiguity," though it recognized that water contiguity is "legal[]" in Virginia. J.S. App. 26a. The majority also took issue with the Enacted Plan's VTD splits, *id.* 27a, notwithstanding Dr. McDonald's concession that avoiding VTD splits is not a traditional principle, Tr. 218-22. The majority nonetheless condemned the Legislature for availing itself of these permissible methods because they were purportedly used for racial reasons. J.S. App. 24a-30a. But *Shaw* does not condemn racially-influenced line-drawing that *comports* with traditional principles, only that which *subordinates* such principles. *Ala.*, 135 S. Ct. at 1270. Anyway, Alternative District 3 *also* uses water contiguity, Pl. Ex. 49, and has the *same number* of VTD splits

affecting population as the Enacted Plan, *see* Int-Def. Ex. 26; J.S. App. 79a-81a.

IV. THE MAJORITY CLEARLY ERRED IN FINDING A *SHAW* VIOLATION

Even assuming that the majority's analysis is not legal error, it is clearly erroneous fact-finding. *See Easley*, 532 U.S. at 242-58 (overturning *Shaw* finding as clearly erroneous). In addition to the legally insufficient facts described above, the majority relied on a VTD analysis that is even *less* defensible than the analysis this Court rejected as a matter of law in *Easley*. *See id.* at 245-48.

The majority cited Dr. McDonald's VTD analysis as suggesting that the Legislature in 2012 placed predominantly black, highly Democratic VTDs into District 3, but not similarly-situated Democratic VTDs that were "largely white," thus purportedly evincing a *racial* purpose. J.S. App. 34a. Specifically, Dr. McDonald identified VTDs "in the localities that comprise or are adjacent to the [Enacted] Third District" that have a "Democratic performance greater than 55%." Pl. Ex. 28, at 7-8; Tr. 87-90. He observed that the average BVAP in the 189 such VTDs in District 3 is 59.5% and in the 116 such VTDs in adjacent localities is 43.5%, and claims that this 16% BVAP difference shows "that race trumped politics" in the drawing of District 3. Tr. 88.

This analysis suffers from "major deficiencies." J.S App. 75a. At the threshold, it "proves" only what the Legislature *stated* it was doing—preserving District 3's core—but says nothing about whether the 2012 alteration of District 3 was racial rather than political. *159* of Dr. McDonald's *189* 55%-Democratic VTDs in District 3 *already* were included in

Benchmark District 3 (and their average BVAP is 60%, higher than the average BVAP in VTDs added to District 3 in 2012). *Id.* Of course, VTDs in the majority-black Benchmark district necessarily have a much higher BVAP than those located in the majority-white Benchmark districts. Reducing this disparity would have required moving VTDs in "the middle" of District 3, which could only be done, as Dr. McDonald conceded, by "dismantl[ing] District 3 and chang[ing] its form quite dramatically." Tr. 154. But this would have violated core preservation and incumbency protection and, as noted, the 2012 Plan's VTD swaps at the margins of District 3 had a political effect identical to their racial effect. *See supra* Part II.

Moreover, even Dr. McDonald's analysis of VTDs largely in Benchmark District 3 reveals a *political* pattern no different from their *racial* pattern. Based on Dr. McDonald's own analysis and not Mr. Morgan's analysis the majority (falsely) contends is incorrect, "while the highly Democratic VTDs within [District 3] had a BVAP *16* percentage points greater, they also performed *15.5* percentage points better for Democrat[s]" than the VTDs in adjacent localities. J.S. App. 75a-76a (emphases added). Thus, just as in *Easley*, Plaintiffs' analysis does not show that "the excluded white precincts were as reliably Democratic as the African-American precincts that were included in" District 3, or rebut the hypothesis that the Legislature, "by placing reliable Democratic precincts within a district without regard to race, end[ed] up with a district containing more heavily African-American precincts, but the reasons w[ere] political rather than racial." *Easley*, 532 U.S. at 245-46.

Finally, Dr. McDonald defined the excluded VTDs as any VTDs in "*localities*" adjacent to Enacted District 3. J.S. App. 74a-75a. Accordingly, some of the VTDs are up to *thirty miles away* from District 3's boundary. *Id.* 75a. Thus, again just as in *Easley*, Plaintiffs' analysis ignores whether any of the "excluded white-reliably-Democratic precincts were located near enough to [District 3's] boundaries or each other for the legislature as a practical matter" to have included them, "without sacrificing other important political goals." *Easley*, 532 U.S. at 246.

V. THE MAJORITY MISAPPLIED THE NARROW TAILORING REQUIREMENT

Although it is irrelevant because the finding that race predominated cannot stand, the majority's strict scrutiny analysis is legally erroneous. The majority concluded that "the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5," but adopted a narrow tailoring analysis irreconcilable with *Alabama*. J.S. App. 37a.

Narrow tailoring "insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." *Ala.*, 135 S. Ct. at 1274. Legislatures "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary." *Id.* (emphasis original).

This deferential standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest" or that a legislature "guess precisely what percentage reduction a court or the

Justice Department might eventually find to be retrogressive." *Id.* "The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome." *Id.* "The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few." *Id.*

Narrow tailoring thus accords legislatures significant discretion to choose from among a range of VRA-compliant redistricting options. *See id.* Most obviously, a legislature necessarily has a "good reason" to choose the Section 5-compliant plan that *least subordinates* neutral principles. Such an option *best* complies with *Shaw* by *minimizing* the potential conflict between the non-retrogression mandate and race-neutral principles.

The Legislature clearly had "good reasons to believe" that the Enacted Plan was appropriate to comply with Section 5. *Id.* First, Delegate Janis *correctly* interpreted Section 5 as prohibiting "retrogress[ing] minority voting influence" in District 3. *Compare* J.S. App. 2a, 21a-23a, *with Ala.*, 135 S. Ct. at 1274. Moreover, the year prior to adoption of the Enacted Plan, the Legislature adopted, with strong support from black legislators, a House of Delegates redistricting plan with 55% or higher BVAP in all majority-black districts, including in geographic areas covered by District 3. *See* Int.-Defs.

Ex. 13 at 26. Because black legislators did not want to *harm* black voters, there were very good reasons to believe that this level of BVAP, far from "packing," properly avoided diminishing those voters' ability to elect. *See Georgia v. Ashcroft*, 539 U.S. 461, 484, 489-91 (2003) (finding "significant" the views of "representatives . . . protected by the Voting Rights Act").

Most importantly, the Enacted Plan with 56.3% BVAP in District 3 performs *better* on the Legislature's political, incumbency-protection, and core-preservation priorities than *any* alternative proposed at the time or in litigation. The Enacted Plan outperformed the Benchmark Plan with 53.1% BVAP in District 3 on *both* politics and principles such as locality splits. *See* Pl. Ex. 4 at 11; Int.-Def. Ex. 20. For this reason, Plaintiffs had to reduce District 3's BVAP to 50.2% to achieve the Alternative Plan's marginal improvement of one locality split—which came at the expense of the Legislature's political, incumbency-protection, and core-preservation priorities. J.S. App. 89a. Since the Enacted Plan's 3.2% BVAP increase affirmatively served its non-racial goals over the alternatives that undermined them, the 56.3% BVAP option optimally *reduced* conflict between race and neutral principles. *See Ala.*, 135 S. Ct. at 1270-74; *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.) (enacted district need not "defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'").[3]

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[3] The majority's analogy to *Bush*, J.S. App. 41a, is strained at best: the district in *Bush* was 35.1% *minority*-black and not even *plurality*-black, but instead plurality-Hispanic, 517 U.S. at 983.

Nonetheless, the majority again reasoned that the Enacted Plan was not narrowly tailored because it increased District 3's BVAP. J.S. App. 40a. But the notion that BVAP increases are not "narrowly tailored" because they are not the "least restrictive means" for Section 5 compliance is a legally incorrect test, as *Alabama* confirms, which is why the majority no longer *articulated* this as the test (but nonetheless continued to *apply* it). Mem. Op. 43 (DE 109); J.S. App. 39a-40a. Rather, *Alabama* confirms that the *Legislature* gets to choose *among permissible* non-retrogressive BVAP options, including those which slightly increase BVAP without "packing," particularly where the higher-BVAP option *better* complies with neutral principles. *See* 135 S. Ct. at 1274; J.S. App. 39a-40a. Using the Benchmark BVAP as a ceiling injects *more* race-consciousness by placing states in a racial straitjacket of precisely replicating or reducing BVAP—exactly the type of "trap for an unwary legislature" that *Alabama* forecloses. *Id.* This is particularly obvious here since *augmenting* District 3's BVAP could not have resulted from Delegate Janis's purported desire to avoid *reducing* that 53.1% BVAP, so was necessarily attributable to the incumbency-protection objective it directly furthered.

Yet the legislature added *15.8%* BVAP to transform it into a majority-black district, ostensibly in the name of avoiding retrogression. *Id.* But obviously such a dramatic *creation* of a majority-black district was not non-retrogressive "maintenance," but improper "substantial augmentation" of BVAP. *Id.* Here, the Legislature *preserved* an existing majority-black district and increased its BVAP by *3.2%* in a manner that advanced its political goals and race-neutral priorities.

The majority also reverted to its contention that the Enacted Plan is not narrowly tailored because the Legislature did not conduct a costly and debatable racial bloc voting analysis. J.S. App. 42a. But *Alabama* does not require such an analysis. *See* 135 S. Ct. at 1274. Moreover, it is clear that any such analysis to support *reduction* of the BVAP would have been irrelevant here, because such reduction was *foreclosed* by the neutral objectives since it inherently endangered incumbents. Had the Legislature performed Plaintiffs' voting analysis, it would have resulted in either a minor decrease to the 50.2% BVAP selected by Plaintiffs' Alternative or a dramatic reduction to *less than 30%* BVAP (the non-retrogression percentage resulting from Plaintiffs' voting analysis). Tr. 196. The first option indisputably endangers at least one incumbent and the second, 30% option would have required massive redrawing of many districts' lines and could never be *proven* to be non-retrogressive to the Justice Department. Since any voting analysis was only relevant to supporting a BVAP reduction that both exacerbated the *Shaw* violation by subordinating neutral incumbency protection and at least seriously jeopardized Section 5 preclearance, the Legislature had excellent reasons to eschew this purposeless waste of resources.

CONCLUSION

The Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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June 22, 2015

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAWN CURRY PAGE, *et al.*,

Plaintiffs,

vs.

Civil Action No.
3:13cv678

VIRGINIA STATE BOARD
OF ELECTIONS, *et al.*,

Defendants.

MEMORANDUM OPINION

DUNCAN, Circuit Judge:

In the political landscape prior to the Supreme Court's June 25, 2013, decision in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), the Virginia legislature undertook the task of crafting United States congressional districts with the overarching goal of compliance with the Voting Rights Act of 1965 ("VRA") as it was then interpreted. In describing the methodology used in drawing the abstract lines currently under consideration, Delegate William Janis, the architect of that legislation, explained it thus:

> I focused on the [Third] Congressional District and ensuring, based on recommendations that I received from Congressman Scott[, the representative from the Third Congressional District,] and from all 11 members of the congressional delegation, Republican and Democrat—one of the paramount concerns and considerations that was not permissive and nonnegotiable under federal law and under constitutional precedent is that the [Third] Congressional District not retrogress in minority voter influence.
>
> And that's how the lines were drawn .... [T]he primary focus of how the lines in [the redistricting legislation] were drawn was to ensure that there be no retrogression in the [Third] Congressional District. Because if that occurred, the plan would be unlikely to survive a challenge either through the Justice Department or the courts because it would not comply with the constitutionally mandated requirement that there be no retrogression in the minority voting influence in the [Third] Congressional District.

Pls.' Trial Ex. 43, at 25.[1] Delegate Janis's efforts were successful. His proposed legislation was approved by the United States Department of Justice ("DOJ"), which found that it did not effect any retrogression in the ability of minorities to elect their candidates of choice.[2] As we explain below, however,

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[1] Because of Delegate Janis's key role as sponsor of the legislation at issue, we cite his views frequently.

the Supreme Court's *Shelby County* decision significantly altered the status quo.

Before turning to a description of the history of the litigation and an analysis of the issues it presents, we wish to emphasize at the outset what we hope will be clear throughout. We imply no criticism of Delegate Janis or Defendants, and do not question that all attempted to act appropriately under the circumstances as they understood them to be at the time. We must nevertheless determine whether the Virginia legislation passes constitutional muster, particularly in the wake of *Shelby County*.

I. THE LITIGATION

Plaintiffs Dawn Curry Page, Gloria Personhuballah, and James Farkas [3] ("Plaintiffs") brought this action against Defendants Charlie Judd, Kimberly Bowers, and Don Palmer—in their respective official capacities of Chairman, Vice-Chair, and Secretary of the Virginia State Board of Elections[4]—and Intervenor-Defendants Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell, and

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[2] As we discuss in greater detail below, in distinguishing the case before us from that in *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996), the dissent finds it significant that the legislative goal of maintaining minority voting strength in the Third Congressional District was not also articulated in the preclearance submission. With respect, we do not.

[3] Named Plaintiff Dawn Curry Page was dismissed from this case via stipulation of dismissal on April 9, 2014. (ECF No. 79).

[4] Original Defendants, the Virginia State Board of Elections and Kenneth T. Cuccinelli, II, Attorney General of Virginia, were dismissed from this case via stipulation of dismissal on November 21, 2013. (ECF No. 14).

Robert Hurt [5] —all congressmen in the Commonwealth of Virginia—(collectively, "Defendants") [6] challenging the constitutionality of Virginia's Third Congressional District as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. On October 7, 2014, this court issued a ruling in which we concluded that compliance with Section 5 of the VRA ("Section 5"), and accordingly, consideration of race, predominated in the drawing of the congressional district boundaries, and that the redistricting plan could not survive the strict scrutiny required of race-conscious districting because it was not narrowly tailored. *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2014 WL 5019686 (E.D. Va. Oct. 7, 2014), *vacated sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

Intervenor-Defendants appealed this decision to the United States Supreme Court,[7] and on March 30,

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[5] Virginia Representatives David Brat and Barbara Comstock moved to intervene as additional Intervenor-Defendants on April 13, 2015. (ECF No. 146). We granted this motion on May 11, 2015. (ECF No. 165).

[6] Because Plaintiffs do not seek different remedies against Defendants and Intervenor-Defendants, we refer to them collectively unless the basis for a distinction is apparent.

[7] Pursuant to 28 U.S.C. § 1253, "any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Because Plaintiffs brought this action under Section 5, it was "heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28." 52 U.S.C. § 10304(a) (formerly cited as 42 U.S.C. § 1973c).

2015, the Court vacated our judgment and remanded this case to us for reconsideration in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). *Cantor*, 135 S. Ct. 1699. Obedient to the mandate, we have reconsidered this case and, once again, conclude that Virginia's Third Congressional District is unconstitutional. We incorporate in this opinion the parts of our now-vacated opinion that are consistent with the Supreme Court's decision in *Alabama*.

Resolution of the issues before us involves an analysis of the interplay between the VRA and Virginia law governing voting rights and the redistricting process. We therefore begin by laying out the framework that will guide that analysis. We then set out the factual background and procedural history of this litigation, before proceeding to the issues at hand.

A. Voting Rights Act Background

A brief description of the history and purpose of the VRA, and its impact on Virginia, is a useful predicate for the discussion that follows. The VRA, passed in 1965, "was originally perceived as a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South." *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring). The VRA "is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966), abrogated by *Shelby Cnty.*, 133 S. Ct. 2612.

Section 4 of the VRA outlines "a formula defining the States and political subdivisions to which [the

statute's] . . . remedies apply," *Id.* This "coverage formula" includes states or political subdivisions with the following characteristics: 1) as of November 1964, they maintained a test or device as a prerequisite for voting or registration; and 2) 1964 census data indicated that less than 50% of the voting-age population was registered to vote. *See* 52 U.S.C. § 10303(b) (formerly cited as 42 U.S.C. § 1973b). Section 5 contains specific redistricting requirements for jurisdictions deemed covered under Section 4. *See id.* § 10304(a).

In November 1964, Virginia met the criteria to be classified as a "covered jurisdiction" under Section 5. *See id.* § 10303-10304. As such, Virginia was required to submit any changes to its election or voting laws to the DOJ for federal preapproval, a process called "preclearance." *See id.* § 10304(a). To obtain preclearance, Virginia had to demonstrate that a proposed change had neither the purpose nor effect "of denying or abridging the right to vote on account of race or color." *Id.*

The legal landscape changed dramatically in 2013, when the Supreme Court ruled that Section 4's coverage formula, described above, was unconstitutional. *Shelby Cnty.*, 133 S. Ct. at 2631. The Court concluded that the formula, although rational in practice and theory when the VRA was passed in 1965, was no longer justified by current voting conditions. *Id.* at 2627. As a result of the invalidation of the coverage formula under Section 4, Virginia is no longer obligated to comply with the preclearance requirements of Section 5. *See id.* at 2631.

B. Factual Background

We turn now to the Virginia constitutional and statutory scheme. The Virginia Constitution requires the state legislature to reapportion Virginia's United States congressional districts every ten years based on federal census data. Districts must be "contiguous and compact territory . . . constituted as to give, as nearly as practicable, representation in proportion to the population of the district." Va. Const. art. II, § 6.

Virginia's Third Congressional District was first created as a majority African-American district in 1991. *See* Va. Code §§ 24.1-17.303 (1991); 24.1-17.303 (1992); 24.2-302 (1993). At that time, the Third Congressional District had an African-American population of 63.98%, and a black voting-age population ("BVAP," the percentage of persons of voting age who identify as African-American) of 61.17%. *Moon v. Meadows*, 952 F. Supp. 1141, 1146 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997).

The 2010 federal census showed that Virginia's population grew 13% between 2000 and 2010. Pls.' Trial Ex. 1, at 18. Because the growth was unevenly distributed, Virginia had to redraw its congressional districts in order to balance population totals within each district. *See id.* Pursuant to that goal, Virginia's Senate Committee on Privileges and Elections adopted Committee Resolution No. 2, establishing goals and criteria concerning applicable legal requirements and policy objectives for redrawing Virginia's congressional districts. *See* Pls.' Trial Ex. 5. The criteria included: 1) population equality among districts; 2) compliance with the laws of the United States and Virginia, including protections against diluting racial minority voting strength and putting

minority voters in a worse position than they were before the redistricting change ("retrogression"); 3) contiguous and compact districts; 4) single-member districts; and 5) consideration of communities of interest. *Id.* at 1-2. The Virginia Senate noted that, although "[a]ll of the foregoing criteria [would] be considered in the districting process[,] . . . population equality among districts and compliance with federal and state constitutional requirements and the [VRA] *[would] be given priority* in the event of conflict among the criteria." *Id.* at 2 (emphasis added).

Delegate Janis used the 2010 census data to draw a new plan for Virginia's United States congressional districts. Delegate Janis presented his plan, House Bill 5004, to the House of Delegates on April 6, 2011; the House adopted it six days later. Pls.' Trial Ex. 8, at 7. The Virginia Senate, however, rejected Delegate Janis's plan and replaced it with a plan sponsored by State Senator Mamie Locke. *Id.* The House and Senate were unable to reconcile the competing plans and the redistricting effort stalled. *Id.* at 8.

The November 2011 elections changed the composition of the Virginia Senate, and, in January 2012, the newly seated House and Senate adopted Delegate Janis's plan without any changes.[8] *See id.* Governor Bob McDonnell signed the plan into law on January 25, 2012. *Id.* at 9. The congressional districting plan ("2012 Plan") is codified at Va. Code Ann. § 24.2-302.2.

The 2012 Plan divides Virginia into eleven congressional districts. Plaintiffs describe the

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[8] Delegate Janis's bill was renamed House Bill 251 but remained identical to the original House Bill 5004.

boundaries of the Third Congressional District as follows:

> The northwest corner of the district includes parts of Richmond and the north shore of the James River. It then crosses the James River for the first time and juts west to capture parts of Petersburg. The district again crosses to the north shore of the James River to include parts of Newport News, though this portion of the district is not contiguous with any other part of the district. The district then hops over part of Congressional District 2 to include part of Hampton and crosses the James River and Chesapeake Bay to capture part of Norfolk, which is not contiguous with any other part of [the district].

(Compl. ¶ 34, ECF No. 1). A majority of the voting age population in the 2012 Plan's Third Congressional District is African-American. Whereas the BVAP of the previous iteration of the Third Congressional District ("Benchmark Plan"), formed after the 2000 census, was 53.1%, the BVAP of the 2012 Plan's Third Congressional District is 56.3%. Pls.' Trial Ex. 27, at 14. There is no indication that this increase of more than three percentage points was needed to ensure nonretrogression, however, because the 2012 Plan was not informed by a racial bloc voting or other, similar type of analysis. *See* Trial Tr. 198:5-8, 342:11-23, 354:18-355:2. A racial bloc voting analysis, which legislatures frequently use in redistricting, studies the electoral behavior of minority voters and ascertains how many African-American voters are needed in a congressional district to avoid diminishing minority voters' ability

to elect their candidates of choice. Trial Tr. 62:21-63:7, 98:16-99:2; Pls.'s Trial Ex. 43, at 15.

Virginia submitted the 2012 Plan to the DOJ for Section 5 preclearance. As we have noted, the DOJ precleared the plan on March 14, 2012, finding that it did not effect any retrogression in the ability of minorities to elect their candidates of choice. (Defs.' Mem. Supp. Mot. Summ. J. 7, ECF No. 37),

On June 25, 2013, the Supreme Court issued its decision in *Shelby County*. As a result, as we have explained, Section 5's requirements of review and preclearance for covered areas no longer apply to Virginia with respect to future changes to its voting and election laws. *See Shelby Cnty.*, 133 S. Ct. at 2631.

C. Procedural History

Plaintiffs[9] brought this action on October 2, 2013, alleging that Virginia used the Section 5 preclearance requirements as a pretext to pack African-American voters into Virginia's Third Congressional District and reduce these voters' influence in other districts. (Compl. ¶¶ 3, 40, ECF No. 1). Plaintiffs sought a declaratory judgment that Virginia's Third Congressional District, as drawn in the 2012 Plan, is a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 10. Plaintiffs also sought to permanently enjoin Defendants from giving effect to the boundaries of the Third Congressional District, including barring Defendants from conducting elections for the United

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[9] Named Plaintiffs are all United States citizens who are registered to vote in the Commonwealth of Virginia and reside in the Third Congressional District. (Compl. ¶¶ 7-9, ECF No. 1).

States House of Representatives based on the current Third Congressional District. *Id.*

Any action under Section 5 must "be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28." 52 U.S.C. § 10304(a) (formerly cited as 42 U.S.C. § 1973c); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 560-63 (1969). Because Plaintiffs' action "challeng[ed] the constitutionality of the apportionment of congressional districts" in Virginia, 28 U.S.C. § 2284(a), the Chief Judge of the United States Court of Appeals for the Fourth Circuit granted Plaintiffs' request for a hearing by a three-judge court on October 18, 2013. (ECF No. 10).

Virginia Congressmen Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt moved to intervene as Defendants in the case on November 25, 2013. (ECF No. 16). On December 20, 2013, all Defendants moved for summary judgment. (ECF Nos. 35, 38). We denied the motions on January 27, 2014. (ECF No. 50). A two-day bench trial began on May 21, 2014. (ECF Nos. 100, 101). We then ordered the parties to file post-trial briefs. (ECF No. 99) . After reviewing those briefs, we determined on June 30, 2014, that further oral argument would not assist in the resolution of the issues before the Court. (ECF No. 108).

On October 7, 2014, we issued a ruling finding Virginia's Third Congressional District unconstitutional. (ECF Nos. 109, 110). On October 30, 2014, Intervenor-Defendants noticed their appeal

to the Supreme Court.[10] (ECF No. 115) . On January 27, 2015, while Intervenor-Defendants' appeal to the Supreme Court was pending, Intervenor-Defendants moved to postpone—until September 1, 2015—the remedial deadline of April 1, 2015, imposed by our order of October 7. (ECF No. 125). We entered an order granting this motion on February 23, 2015. (ECF No. 138).

On March 25, 2015, the Supreme Court issued its decision in *Alabama*. Relevant here, the Court held that the district court improperly concluded that race did not predominate in the challenged redistricting effort because "it placed in the balance, among other [traditional] nonracial factors, legislative efforts to create districts of approximately equal population." *Alabama*, 135 S. Ct. at 1270. While the Court noted that equal population objectives "may often prove 'predominant' in the ordinary sense of that word," the question of whether race predominated over traditional raced-neutral redistricting principles is a "special" inquiry: "It is not about whether a legislature believes that the need for equal population takes ultimate priority," but rather, whether the legislature placed race above nonracial considerations in determining *which* voters to allocate to certain districts in order achieve an equal population goal. *Id.* at 1270-71. The Court further observed that, had the district court properly treated the equal population goal as "a background rule against which redistricting takes place," its predominance conclusions may have been different—particularly given evidence that the legislature's goal of maintaining existing racial percentages in

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[10] Defendants did not appeal our decision.

majority-minority districts significantly impacted the boundaries of one of the challenged districts. *Id.* at 1271.

In addition, the Court ruled that the district court's finding that the challenged districts would survive strict scrutiny rested upon a misperception of the requirements of Section 5.[11] *Id.* at 1272. The Court explained that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage," but instead "requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *Id.* The Court concluded that, in "rel[ying] heavily upon a mechanically numerical view as to what counts as forbidden retrogression," the district court failed to ask the question critical to the narrow tailoring analysis: To what extent was the legislature required to "preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.* at 1273-74.

On March 30, 2015, the Supreme Court vacated our judgment of October 7, 2014, and remanded the case for reconsideration under *Alabama*. *Cantor*, 135 S. Ct. 1699. On April 3, 2015, we ordered the parties to file briefs regarding the effect on this case, if any, of the Supreme Court's *Alabama* decision. (ECF No. 144). Having reviewed those briefs, this case is now ripe for disposition on remand.

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[11] The Court expressly declined to "decide whether, given *Shelby County*, continued compliance with § 5 remains a compelling interest." *Alabama*, 135 S. Ct. at 1274. Thus, the decision in *Alabama* impacts only that portion of our opinion discussing the narrow tailoring prong of the strict scrutiny analysis.

II. ANALYSIS

To successfully challenge the constitutionality of the Third Congressional District under the Equal Protection Clause, Plaintiffs first bear the burden of proving that the legislature's predominant consideration in drawing its electoral boundaries was race. If they make this showing, the assignment of voters according to race triggers the court's "strictest scrutiny." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Then, the burden of production shifts to Defendants to demonstrate that the redistricting plan was narrowly tailored to advance a compelling state interest. *See Shaw II*, 517 U.S. at 908.

For the reasons that follow, we find that Plaintiffs have shown race predominated. We find that the Third Congressional District cannot survive review under the exacting standard of strict scrutiny. While compliance with Section 5 was a compelling interest when the legislature acted, the redistricting plan was not narrowly tailored to further that interest. Accordingly, we are compelled to hold that the challenged Third Congressional District violates the Equal Protection Clause of the Fourteenth Amendment.

A. Race As the Predominant Consideration in Redistricting

As with any law that distinguishes among individuals on the basis of race, "equal protection principles govern a State's drawing of congressional districts." *Miller*, 515 U.S. at 905. "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal

of a political system in which race no longer matters ..." *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 657 (1993). As such, "race-based districting by our state legislatures demands close judicial scrutiny." *Id.*

To trigger strict scrutiny, Plaintiffs first bear the burden of proving that race was not only one of several factors that the legislature considered in drawing the Third Congressional District, but that race "predominated." *Bush v. Vera*, 517 U.S. 952, 963 (1996). The Supreme Court has emphasized that this burden "is a 'demanding one," *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 241 (2001) (quoting *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)):

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 515 U.S. at 916. The Supreme Court has cited several specific factors as evidence of racial line drawing: statements by legislators indicating that race was a predominant factor in redistricting, *see id.*, 515 U.S. at 917-18; evidence that race or percentage of race within a district was the single redistricting criterion that could not be compromised, *see Shaw II*, 517 U.S. at 906-07; creation of non-compact and

oddly shaped districts beyond what is strictly necessary to avoid retrogression, *see Shaw I*, 509 U.S. at 646-48; use of land bridges in a deliberate attempt to bring African-American population into a district, *see Miller*, 515 U.S. at 917; and creation of districts that exhibit disregard for city limits, local election precincts, and voting tabulation districts ("VTDs"), *see Bush*, 517 U.S. at 974. As we demonstrate below, all of these factors are present here.[12] Moreover, we do not view any of these factors in isolation. We consider direct evidence of legislative intent, including statements by the legislation's sole sponsor, in conjunction with the circumstantial evidence supporting whether the 2012 Plan complies with traditional redistricting principles.

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[12] In contending that Plaintiffs do not make this "initial" showing, the dissent notes, among other things, that Plaintiffs failed to produce an adequate alternative plan showing "that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Cromartie II*, 532 U.S. at 258. While the dissent acknowledges "that the attacking party is not confined in its form of proof to submitting an alternative plan," post at 100, it makes much of the fact that the alternative plan proffered by Plaintiffs accomplishes a more favorable result for Democrats than does the Enacted Plan. However, the significance of the discrepancy between these political outcomes is overstated, and relies on an assumption that the legislature's political objective was to create an 8-3 incumbency protection plan. *See* Trial Tr. 180-81 (noting that the Alternative Plan would only undermine incumbency protection objectives if it was the legislature's political goal to have an 8-3 split, which is something "we don't have knowledge" of). This inference is not supported by the record, as we develop more fully below.

1. Direct Evidence of Legislative Intent

When analyzing the legislative intent underlying a redistricting decision, we agree with the dissent that there is a "presumption of good faith that must be accorded legislative enactments." *Miller*, 515 U.S. at 916. This presumption "requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* Such restraint is particularly warranted given the "complex interplay of forces that enter a legislature's redistricting calculus," *id.* at 915-16, making redistricting possibly "the most difficult task a legislative body ever undertakes," *Smith v. Beasley*, 946 F. Supp. 1174, 1207 (D.S.C. 1996) (three-judge court).

Nevertheless, "the good faith of the legislature does not excuse or cure the constitutional violation of separating voters according to race," *Id.* at 1208. Here, "[w]e do not question the good faith of the legislature in adopting [the 2012 Plan]" so long as "[t]he members did what they thought was required by [Section 5] and by the Department of Justice at the time." *Id.* At this stage of the analysis, we are concerned only with whether legislative statements indicate that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without [the Third Congressional District]." *Miller*, 515 U.S. at 916. We find such statements here, drawn from multiple sources.

We must also note, however, that it is inappropriate to confuse this presumption of good faith with an obligation to parse legislative intent in search of "proper" versus "improper" motives

underlying the use of race as the predominant factor in redistricting, as the dissent does here. The legislative record here is replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan. Yet the dissent urges us to consider such statements as mere legislative acknowledgments of the supremacy of federal law, specifically the VRA.[13] The dissent argues that subjecting a redistricting plan to strict scrutiny when it separates voters according to race as a means to comply with Section 5 "trap[s] [legislatures] between the competing hazards of [VRA and Constitutional] liability," *Bush*, 517 U.S. at 992

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[13] The dissent also makes much of the legislature's stated goal of compliance with the one-person-one-vote rule. Although the dissent is certainly correct to observe that the Supremacy Clause mandated compliance with this rule, the Supreme Court in *Alabama* made clear that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met." *Alabama*, 135 S. Ct. at 1270. Accordingly, we too take the legislature's stated population equality goals as a given, and focus instead on the direct evidence in the record that the legislature predominantly relied on race in its efforts to meet these equal population goals.

We further take issue with the dissent's contention that "[r]ace, like equal population, is a mandatory consideration," and therefore functions, like an equal population goal, as a background rule for redistricting. Post at 68. The fact that the legislature considered race a predominant concern only because it believed federal law compelled it to do so is of no current legal consequence. Instead, what matters for the purpose of our analysis here is that race *did* predominate in drawing the Third Congressional District, as revealed by the evidence we describe below.

(O'Connor, J., concurring),[14] but this is a red herring. While "[a]pplying traditional equal protection principles in the voting-rights context is 'a most delicate task,'" *Shaw II*, 517 U.S. at 905 (quoting *Miller*, 515 U.S. at 905) —and we certainly do not, as the dissent asserts, hold "that the intentional use of race in redistricting, taken alone, triggers strict scrutiny," post at 71—we must apply strict scrutiny when, as here, there is strong direct and circumstantial evidence that race was the only "nonnegotiable" criterion.

a. Defendants' Statements

Defendants concede that avoiding retrogression in the Third Congressional District and ensuring compliance with Section 5 was the legislature's primary priority in drawing the 2012 Plan. Defendants acknowledge that the legislature's top two priorities were "compliance with applicable federal and state laws, expressly including the [VRA,]" and population equality. (Defs.' Mem. Supp. Mot. Sum. J. 12, ECF No. 37). Moreover, Defendants "concede[ ] that compliance with Section 5 was [the legislature's] predominant purpose or compelling interest underlying District 3's racial composition in 2012." (Int-Defs.' Mem. Supp. Mot. Summ. J. 15, ECF No. 39). Of course, we do not view the language of the Intervenor-Defendants' summary judgment brief

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[14] The dissent relies solely on Justice O'Connor's concurrence in *Bush* to make this argument. The language quoted by the dissent appears in the context of Justice O'Connor's assertion that compliance with Section 2 of the VRA is a compelling state interest, *see Bush*, 517 U.S. at 990-92 (O'Connor, J., concurring), but Justice O'Connor's opinion also specifically notes that using race as a proxy for VRA compliance should be subject to strict scrutiny, *see id.* at 993.

as a binding concession. Rather, we take it for what it is—a candid acknowledgement of the incontrovertible fact that the shape of the Third Congressional District was motivated by the desire to avoid minority retrogression in voting.[15]

b. Racial Threshold As the Means to Achieve Section 5 Compliance

Defendants' expert, John Morgan, also acknowledged that the legislature "adopted the [2012 Plan] with the [Third Congressional District] Black VAP at 56.3%" because legislators were conscious of maintaining a 55% BVAP floor. Int. Defs.' Trial Ex. 13, at 27. In 2011, the legislature enacted "a House of Delegates redistricting plan with a 55% Black VAP as the floor for black-majority districts" with strong bipartisan support. *Id.* at 26. Given the success of this prior usage of a 55% BVAP floor, the legislature considered a 55% BVAP floor for the 2012 congressional redistricting "appropriate to obtain Section 5 preclearance, even if it meant raising the Black VAP above the [53.1%] level[ ] in the Benchmark plan." *Id.* at 26-27. The legislature therefore "acted in accordance with that view," *id.* at 27, when adopting the 2012 Plan, despite the fact

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[15] The dissent contends that we have abandoned our original finding that "there was an admission by the Defendants" that compliance with Section 5 was the legislature's predominant purpose in redistricting. *See* post at 54. However, having never made such a finding, we have no opportunity to abandon the same. As we make clear, we have never interpreted the Intervenor-Defendants' language as a binding concession. Instead, we simply point out here what the dissent is unable to gainsay: that the Defendants candidly recognized that Section 5 compliance was uppermost in the minds of Virginia's legislators when they drew the 2012 Plan.

that the use of a 55% BVAP floor in this instance was not informed by an analysis of voter patterns. Indeed, when asked on the House floor whether he had "any empirical evidence whatsoever that 55[% BVAP] is different than 51[%] or 50[%]," or whether the 55% floor was "just a number that has been pulled out of the air," Delegate Janis, the redistricting bill's author, characterized the use of a BVAP floor as "weighing a certainty against an uncertainty." Pls.' Trial Ex. 45, at 7.

c. Statements by the Author of the 2012 Congressional Maps

In addition to Defendants' statements, we credit explanations by Delegate Janis, the legislation's sole author, stating that he considered race the single "nonnegotiable" redistricting criterion. Pls.' Trial Ex. 43, at 25. In disagreeing, the dissent attempts to discount the meaning of these statements by placing great reliance on remarks by legislative opponents characterizing the redistricting legislation as an incumbency protection plan, and by parsing Delegate Janis's statements regarding compliance with federal law generally from the necessary antecedent of relying on race to do so. In the face of Delegate Janis's clear words, we do not find these efforts persuasive.[16]

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[16] Perhaps this is also the appropriate juncture at which to address the dissent's rejection of the credibility of Plaintiffs' expert, Dr. Michael McDonald, and endorsement of Defendants' expert, Mr. Morgan, which we find somewhat puzzling. We find it no more damning that Dr. McDonald has testified differently in different contexts than that Mr. Morgan has testified consistently on the same side. Nor is the exploration of issues in an academic piece, written before Dr. McDonald was retained by Plaintiffs and before he fully evaluated the evidence here, of

Delegate Janis emphasized that his "primary focus" in drawing Virginia's new congressional maps was ensuring that the Third Congressional District maintained at least as large a percentage of African-American voters as had been present in the district under the Benchmark Plan. Pls.' Trial Ex. 43, at 25; *see also* Pls.' Trial Ex. 13, at 8 ("[W]e can have no less [percentage of African-American voters] than percentages that we have under the existing lines. . . .").

For example, at the second floor reading of the redistricting bill in Virginia's House of Delegates on April 12, 2011, Delegate Janis noted that "one of the *paramount* concerns in the drafting of the bill was [the VRA mandate] that [the legislature] not retrogress minority voting influence in the [Third] Congressional District." Pls.' Trial Ex. 43, at 10 (emphasis added). He continued to reiterate this sentiment, noting that he was "*most especially* focused on making sure that the [Third] Congressional District did not retrogress in its minority voting influence." *Id.* at 14-15 (emphasis added).

Delegate Janis also stated that the avoidance of retrogression in the Third Congressional District took

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particular relevance. We do, however, find significant the following facts: that Mr. Morgan proffers no academic work, that he does not have an advanced degree, that his undergraduate degree was in history, that he has never taken a course in statistics, that he has not performed a racial bloc voting analysis, that he did not work with or talk to any members of the Virginia legislature, and that he miscoded the entire city of Petersburg's VTDs. *See* Trial Tr. 334-35, 338-43, 361-65.

primacy over other redistricting considerations because it was "*nonnegotiable*":

> [O]ne of the paramount concerns and considerations that was not permissive and nonnegotiable . . . . is that the [Third] Congressional District not retrogress in minority voter influence . . . . [T]he primary focus of how the lines in House Bill 5004 were drawn was to ensure that there be no retrogression in the [Third] Congressional District. Because if that occurred, the plan would be unlikely to survive a challenge either through the Justice Department or the courts because it would not comply with the constitutionally mandated requirement that there be no retrogression in the minority voting influence in the [Third] Congressional District.

Id. at 25 (emphasis added). Unlike the dissent, we deem it appropriate to accept the explanation of the legislation's author as to its purpose. And there is further support.

2. Circumstantial Evidence of the Third Congressional District's Shape and Characteristics

In addition to the evidence of legislative intent, we also consider the extent to which the district boundaries manifest that legislative will.[17] Evidence

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[17] At this juncture, we must take issue with the manner in which the dissent considers Plaintiffs' circumstantial evidence. When evaluating evidence of the Third Congressional District's shape, compactness, contiguity, political subdivision splits, and population swaps, the dissent considers each in isolation, concluding that no factor alone carries Plaintiffs' burden of showing that race predominated. In addition, the dissent implies that Plaintiffs must, for each of these factors, make a

of a "highly irregular" reapportionment plan "in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions," indicates that racial considerations predominated during the 2011-12 redistricting cycle. *Shaw I*, 509 U.S. at 646-47. We consider each of these factors below.

a. Shape and Compactness

As the Supreme Court has recognized, "reapportionment is one area in which appearances do matter, " *Shaw I*, 50 9 U.S. at 647, and the "obvious fact that the district's shape is highly irregular and geographically non-compact by any objective standard," *Shaw II*, 517 U.S. at 905-06 (internal quotation marks omitted), supports the conclusion that race was the predominant factor in drawing the challenged district. Moreover, compactness is one of two redistricting criteria required by the Virginia Constitution. Va. Const. art. II, § 6 ("Every electoral district shall be composed of contiguous and compact territory . . . .").

Because, as he explained to the Senate Committee on Privileges and Elections, Delegate Janis "didn't examine compactness scores" when drawing the 2012 congressional maps, Pls.' Trial Ex. 14, at 8, we begin

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"necessary showing" that these circumstantial irregularities, considered individually, resulted from racial, rather than political, motivations. Post at 91. Precedent counsels, however, that courts must consider whether these circumstantial factors "*together* weigh in favor of the application of strict scrutiny." *Bush*, 517 U.S. at 962 (emphasis added). No one factor need be "independently sufficient" to show race predominated. *Id.*

with a visual, rather than mathematical, overview of the Third Congressional District's shape and compactness, *see Karcher v. Daggett*, 462 U.S. 725, 762 (1983) (Stevens, J., concurring) (without applying any mathematical measures of compactness, stating that "[a] glance at the [congressional] map shows district configurations well deserving the kind of descriptive adjectives . . . that have traditionally been used to describe acknowledged gerrymanders" (citation omitted)).

Plaintiffs contend that the Third Congressional District is the least compact congressional district in Virginia. Trial Tr. 73:10-14. And, indeed, the maps of the district reflect both an odd shape and a composition of a disparate chain of communities, predominantly African-American, loosely connected by the James River. *See* Trial Tr. 42:13-16; Pls.' Trial Ex. 48. Defendants do not disagree. In fact, Defendants' expert, Mr. Morgan, concedes that the three primary statistical procedures used to measure the degree of compactness of a district all indicate that the Third Congressional District is the least compact congressional district in Virginia. *See* Trial Tr. 375:21-24, 376:9-13. While Defendants acknowledge the irregularity of shape and lack of compactness reflected by the Third Congressional District, they submit that a desire to protect Republican incumbents explains the District's shape, a contention we discuss later. *See infra* Part II.A.3; *see also* Trial Tr. 14:20-15:6.

b. Non-Contiguousness

In addition to requiring compactness, the Virginia Constitution also requires the legislature to consider contiguity when drawing congressional boundaries.

See Va. Const. art. II, § 6. The Virginia Supreme Court has concluded that "land masses separated by water may . . . . satisfy the contiguity requirement in certain circumstances." *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002). While the Third Congressional District is not contiguous by land, it is legally contiguous because all segments of the district border the James River. Trial Tr. 74:22-75:5. Therefore, the Third Congressional District is legally contiguous under Virginia Law. *See Wilkins*, 571 S.E.2d at 109; Trial Tr. 221:12-14.

Yet contiguity and other traditional districting principles are "important not because they are constitutionally required," but rather "because they are objective factors" courts may consider in assessing racial gerrymandering claims. *Shaw I*, 509 U.S. at 647. To show that race predominated, Plaintiffs need not establish that the legislature disregarded every traditional districting principle. *See Miller*, 515 U.S. at 917 (holding that circumstantial evidence such as shape does not need to be sufficient, standing alone, to establish a racial gerrymandering claim). Rather, we consider irregularities in the application of these traditional principles together. Here, the record establishes that, in drawing the boundaries of the Third Congressional District, the legislature used water contiguity as a means to bypass white communities and connect predominantly African-American populations in areas such as Norfolk, Newport News, and Hampton. *See* Trial Tr. 75:15-76:1. Such circumstantial evidence is one factor that contributes to the overall conclusion that the district's boundaries were drawn with a focus on race.

c. Splits in Political Subdivisions

"[R]espect for political subdivisions" is an important traditional districting principle. *Shaw I*, 509 U.S. at 647. A county or city is considered split by a congressional district when a district does not entirely contain that county or city within its borders. *See* Pls.' Trial Ex. 27, at 8. The Third Congressional District splits more local political boundaries than any other district in Virginia. Trial Tr. 76:18-20. It splits nine counties or cities, the highest number of any congressional district in the 2012 Plan. Pls.' Trial Ex. 27, at 9. Moreover, the boundaries of the Third Congressional District contribute to the majority of splits in its neighboring congressional districts. *See id.*

The Third Congressional District also splits more voting tabulation districts, or VTDs, than any of Virginia's other congressional districts. Trial Tr. 78:17-19; *see also* Pls.' Trial Ex. 27, at 10. A VTD is a Census Bureau term referring to what is commonly thought of as a voting precinct. Trial Tr. 78:5-8. In total, the 2012 Plan splits 20 VTDs; the Third Congressional District contributes to 14 of them. *See* Trial Tr. 78:20-21; Pls.' Trial Ex. 27, at 10. While some of these are "technical splits" (i.e., a VTD split that does not involve population; for example, a split across water), such technical splits were used strategically here, as they would not have been necessary "if [the legislature was not] trying to bypass [white] communities using water" and bring predominantly African-American communities into the district. Trial Tr. 79-80.

The dissent contends that the population swaps involving the Third Congressional District—and

resulting locality splits—were necessary to achieve population parity in accordance with the constitutional mandate of the one-person-one-vote rule,[18] *see* post at 92-93, and can also be explained by the traditional redistricting criterion of "preserving district cores,"[19] post at 84. The evidence does not substantiate either of these arguments. It is true that the Virginia legislature needed to add 63,976 people to the Third Congressional District to achieve population parity. *See* Trial Tr. 87. Yet, though the dissent asserts that "it is extremely unlikely that any combination of 'whole' localities in the vicinity of [the Benchmark Plan] could have been added to the [Third Congressional] District to augment the population by exactly 63,976 people," post at 93, Plaintiffs' alternative plan maintains a majority-minority district and achieves the population increase needed for parity, while simultaneously minimizing locality splits and the number of people affected by such splits, *see* Pls.'s Trial Ex. 29, at 1. Although this alternative plan results in only one less locality split than the 2012 Plan, it reduces the number of people affected by the locality splits between the Third Congressional District and Second Congressional District by 240,080.[20] *See* Trial Tr.

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[18] This principle, contained in Article I, Section 2 of the United States Constitution, requires all congressional districts to contain roughly equal populations. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

[19] A new district preserves district cores when it retains most of the previous benchmark district's residents within its boundaries. Trial Tr. 379:3-11.

[20] The total population affected by the Third Congressional District's locality splits with the Second Congressional District in the 2012 Plan is 241,096, while the population affected by the

112; Pls.' Trial Ex. 29, at 5, tbl.3. The alternative plan also reduces the number of VTD splits involving the Third Congressional District from 14 in the 2012 Plan to 11. Trial Tr. 111. Moreover, Plaintiffs' alternative plan, unlike the 2012 Plan, keeps the cities of Newport News, Hampton, and Norfolk intact.[21] *See id.* at 112. This is a particularly important accomplishment because it reflects the fulfillment of a strong public sentiment, as expressed during 2010 redistricting forums,[22] against splitting localities, and in favor of keeping the integrity of cities like Hampton and Norfolk intact. *See* Pls.' Trial Ex. 29, at 5-6; Pls.' Trial Ex. 11-12.

The evidence similarly undercuts the dissent's contention that the boundaries of the Third Congressional District reflect an allegiance to the traditional redistricting principle of preserving district cores. Far from attempting to retain most of the Benchmark Plan's residents within the new

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splits between these districts in the alternative plan is only 1,016. Trial Tr. 112; Pls.' Trial Ex. 29, at 5, tbl. 3.

[21] The fact that the 2012 Plan splits these cities, despite the demonstrated feasibility of achieving population parity while keeping them whole, further refutes the dissent's contention that the population swaps were based on a "desire to limit locality splits." Post at 93. Despite the fact that doing so was unnecessary, the legislature split Newport News and Hampton when it excluded certain low-BVTAP VTDs from the Third Congressional District. *See, e.g.*, Pl.'s Trial Ex. 27, at 17 (showing that VTDs in Newport News with BVAPs of 23.1% were excluded from the Third Congressional District). Similarly, the legislature's removal of predominantly white VTDs from the Third Congressional District contributed to otherwise unnecessary splits in Norfolk. *See* Trial Tr. 436-39.

[22] Virginia attached the transcripts of these hearings to its Section 5 submission. *See* Pls.' Trial Ex. 11-12.

district borders, the 2012 Plan moved over 180,000 people in and out of the districts surrounding the Third Congressional District to achieve an overall population increase of only 63,976 people. Trial Tr. 87. Tellingly, the populations moved out of the Third Congressional District were predominantly white, while the populations moved into the District were predominantly African-American. *Id.* at 81:21-82:6. Moreover, the predominantly white populations moved out of the Third Congressional District totaled nearly 59,000 residents—a number very close to the total required increase of 63,976 people. *See* Pls.' Trial Ex. 27, at 15, tbl. 6; Trial Tr. 87.

While "[t]he Constitution does not mandate regularity of district shape," *Bush*, 517 U.S. at 962, Plaintiffs' circumstantial evidence of the Third Congressional District's irregularities and inconsistencies with respect to the traditional districting criteria described above, coupled with clear statements of legislative intent, supports our conclusion that, in this case, "traditional districting criteria [were] subordinated to race," *id.* (emphasis omitted).

3. Predominance of Race over Politics

Defendants, as well as the dissent, rely heavily on isolated statements in the legislative record, made by opponents of Delegate Janis's bill, suggesting that incumbency protection and partisan politics motivated the 2011-12 redistricting efforts. *See, e.g.*, Pls.' Trial Ex. 43, at 48-49 (opponent of Delegate Janis's plan stating that Janis "admitted today that one of the criteria that he used in development of the plan was incumbent protection," and deeming the redistricting effort "one for incumbency protection

first, last, alpha, and omega"); *id.* at 27 (opponent of the 2012 Plan suggesting that Delegate Janis used incumbency protection as a permissive redistricting criteria). The Supreme Court has made it clear, however, that the views of legislative opponents carry little legal weight in characterizing legislation. *See, e.g., Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) ("[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." (alteration in original)); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964) ("[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents, In their zeal to defeat a bill, they understandably tend to overstate its reach."); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt."). The rationale for this authority is patent: a bill's opponents have every incentive to place a competing label on a statute they find objectionable.

Defendants and the dissent are inarguably correct that partisan political considerations, as well as a desire to protect incumbents, played a role in drawing district lines. It would be remarkable if they did not. However, in a "mixed motive suit"—in which a state's conceded goal of "produc[ing] majority-minority districts" is accompanied by "other goals, particularly incumbency protection"—race can be a predominant factor in the drawing of a district without the districting revisions being "purely race-

based."[23] *Bush*, 517 U.S. at 959 (emphasis omitted). Indeed, the Supreme Court has observed that "partisan politicking" may often play a role in a state's redistricting process, but the fact "[t]hat the legislature addressed these interests [need] not in any way refute the fact that race was the legislature's predominant consideration." *Shaw II*, 517 U.S. at 907.

The dissent's attempts to analogize this case to *Cromartie II* are unavailing. *Cromartie II* involved a challenged district in which "racial identification correlate[d] highly with political affiliation," and the plaintiffs were ultimately unable to show that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" because the challenged redistricting plan furthered the race-neutral political goal of incumbency protection to the same extent as it increased the proportion of minorities within the district, 532 U.S. at 258.

While it may be true, as the dissent observes, that Democratic votes in the Third Congressional District, and presumably many similarly situated districts, "can generally be predicted simply by taking the BVAP of a VTD and adding about 21 percentage points," [24] post at 82, the evidence of political

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[23] We do not, as the dissent implies, suggest that a different legal test applies to a "mixed motive suit." We simply observe that, when racial considerations predominated in the redistricting process, the mere coexistence of race-neutral redistricting factors does not cure the defect.

[24] Aside from the clear distinctions between Plaintiffs' case here and *Cromartie II*, the dissent's contention that the legislature used BVAP as a predictor for Democratic votes is precisely the sort of race-based consideration the Supreme Court has

justification for the redistricting at issue in *Cromartie II* is quite different than that presented in this case. In *Cromartie II*, there was overwhelming evidence in the record "articulat[ing] a legitimate political explanation for [the State's] districting decision," 532 U.S. at 242, including unequivocal trial testimony by state legislators, *see Cromartie I*, 526 U.S. at 549. While Defendants have offered post-hoc political justifications for the 2012 Plan in their briefs, neither the legislative history as a whole, nor the circumstantial evidence, supports that view to the extent they suggest.

For example, Defendants point to a rather ambiguous statement by Delegate Janis that one goal of the 2012 Plan was to "respect . . . the will of the Virginia electorate." (Post-Trial Br. Int.-Defs.' and Defs.' at 12, ECF No. 106 (citing Pls.' Trial Ex. 43, at 19)). Taken in context, however, it is clear that this goal was "permissive" and subordinate to the mandatory criteria of compliance with the VRA and satisfaction of the one-person-one-vote rule. *See* Pls.' Trial Ex. 43, at 18-19. In support of the argument that political concerns trumped racial ones, the dissent points to Delegate Janis's remarks that incumbent legislators confirmed their satisfaction with the lines of their respective congressional districts. *See id.* at 5-6. It is undisputed, however, that the incumbents were not shown the entire 2012

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confirmed triggers strict scrutiny. *See Bush*, 517 U.S. at 968 ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."); *Shaw I*, 509 U.S. at 653 ("[W]e unanimously reaffirmed that racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved . . . .

Plan when they were solicited for their input, but were instead shown only the proposed changes to the lines of their individual districts. *See* Int.-Defs.' Trial Ex. 9, at 9. Delegate Janis testified that he had not asked any congressional representatives "if any of them supported the [redistricting] plan in its totality," or "[spoken] with anyone who plan[ned] to run against those incumbents" regarding the redistricting plan. *Id.* at 14, Delegate Janis stated: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." *Id.*

Finally, the nature of the population swaps and shifts used to create the Third Congressional District suggests that less was done to further the goal of incumbency protection than to increase the proportion of minorities within the district. "[A]mong the pool of available VTDs that could have been placed within the Third Congressional District that were highly Democratic performing," those with a higher BVAP were placed within the Third Congressional District, and those VTDs that were largely white and Democratic were left out, and instead shifted into the Second Congressional District.[25] Trial Tr. 89.

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[25] Defendants' expert, Mr. Morgan, contends that the majority-white populations excluded from the Third Congressional District during redistricting were predominantly Republican. *See* Int.-Defs.' Trial Ex. 13, at 13-14. The evidence at trial, however, revealed that Mr. Morgan's analysis was based upon several pieces of mistaken data, a critical error. *See* Trial Tr. 359:1-14; *id.* at 361:10-365:10 (indicating that Mr. Morgan had miscoded several VTDs as to whether they were part of the Third Congressional District); *id.* at 404:17-25 (stating that Mr.

The record before us presents a picture similar to that in *Shaw II*, in which the Supreme Court found the evidence sufficient to trigger strict scrutiny:

> First, the District Court had evidence of the district's shape and demographics. The court observed the obvious fact that the district's shape is highly irregular and geographically non-compact by any objective standard that can be conceived. In fact, the serpentine district has been dubbed the least geographically compact district in the Nation.
>
> The District Court also had direct evidence of the legislature's objective. The State's submission for preclearance expressly acknowledged that [the] *overriding* purpose was to comply with the dictates of [the DOJ] and to create two congressional districts with effective black voting majorities.

Shaw II, 517 U.S. at 905-06 (citations omitted) (internal quotation marks omitted). As we noted earlier, we do not find the dissent's attempts to distinguish *Shaw II* from the case at hand persuasive. As an initial matter, it is irrelevant that the challenged district in *Shaw II* was not only the least compact in the state, as is the Third Congressional District, but also the least compact district in the nation. Irregularities in shape need not be so extreme as to make the district an outlier nationwide; courts simply consider a "highly irregular and geographically non-compact" shape evidence of the predominance of race. *Id.* at 905-06. As the least

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Morgan's coding mistakes were significant to the outcome of his analysis).

compact and most bizarrely shaped district in the 2012 Plan, the Third Congressional District displays such characteristics. And again, we see no reason why it should make a difference whether Defendants' "explicit and repeated admissions," post at 102, of the predominance of race were made in the course of hearings on the House of Delegates floor, as here, or in the State's Section 5 preclearance submission, as in *Shaw II*. These specific and repeated references, when taken together with the circumstantial evidence of record, compel our conclusion that race was the legislature's paramount concern.

B. Strict Scrutiny Analysis

The fact that race predominated when the legislature devised Virginia's Third Congressional District in 2012, however, does not automatically render the district constitutionally infirm. Rather, if race predominates, strict scrutiny applies, but the districting plan can still pass constitutional muster if narrowly tailored to serve a compelling governmental interest. *See Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Miller*, 515 U.S. at 920. While such scrutiny is not necessarily "strict in theory, but fatal in fact," *Johnson v. California*, 543 U.S. 499, 514 (2005) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)), the state must establish the "most exact connection between justification and classification." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

And because, as we address below, compliance with the VRA is a compelling state interest, the redistricting plan would not fail under the Equal Protection analysis if it had been narrowly tailored to

that interest—that is, if "the legislature ha[d] a strong basis in evidence in support of" its use of race. *Alabama*, 135 S. Ct. at 1274 (internal quotation marks omitted). While the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5, Defendants have failed to show that the 2012 Plan was narrowly tailored to further that interest.[26]

1. Compelling Interest

The fact that *Shelby County* effectively relieved Virginia of its Section 5 obligations in 2013 does not answer the question of whether Section 5 compliance in 2012 was a compelling state interest. The appropriate inquiry is whether the legislature's reliance on racial considerations was, at the time of the redistricting decision, justified by a compelling state interest, not whether it can now be justified in hindsight. *See Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1307-08 (M.D. Ala. 2013) (three-judge court) ("We evaluate the plans in the light of the legal standard that governed the Legislature when it acted, not based on a later decision of the Supreme Court that exempted [the State] from future coverage under section 5 of the [VRA]."), *vacated on other grounds*, 135 S. Ct. 1257.

Although the Supreme Court has yet to decide whether VRA compliance is a compelling state interest, it has assumed as much for the purposes of subsequent analyses. *See, e.g.*, *Shaw II*, 517 U.S. at 915 ("We assume, arguendo, for the purpose of

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[26] Indeed, Defendants do not contend otherwise. Defendants make only limited narrow tailoring arguments, but do not assert that any kind of racial voting analysis informed their decisions.

resolving this suit, that compliance with § 2 [of the VRA] could be a compelling interest . . . ."); *Bush*, 517 U.S. at 977 ("[W]e assume without deciding that compliance with the results test [of the VRA] . . . . can be a compelling state interest."). Particularly because the parties do not dispute that compliance with Section 5 was a compelling interest pre-*Shelby County*,[27] we likewise do not.

2. Narrow Tailoring

We now consider whether the 2012 Plan was "narrowly tailored to achieve that compelling interest." *Shaw II*, 517 U.S. at 908 (alteration omitted). The Supreme Court has repeatedly struck down redistricting plans that were not narrowly tailored to the goal of avoiding "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Bush*, 517 U.S. at 983 (quoting *Miller*, 515 U.S. at 926); *see also Shaw II*, 517 U.S. at 915-18 (concluding that districts were not narrowly tailored to comply with

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[27] Plaintiffs make limited arguments that Section 5 compliance is no longer a compelling state interest. Plaintiffs first contend that *Shelby County* applies retroactively (*See* Pls.' Trial Br. at 21-23, ECF No. 86), relying on *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), which implies only that the Supreme Court's decision that a particular interest does not qualify as a compelling state interest may have retroactive effect. The Supreme Court decided no such thing in *Shelby County*, so this assertion misses the mark. Plaintiffs also argue that compliance with Section 5 cannot be a compelling interest when the legislature conducted no analysis to determine whether an increase in the Third Congressional District's BVAP was necessary, but this point is relevant only to the narrow tailoring prong of the strict scrutiny analysis. (*See* Pls.' Trial Br. at 23-24, ECF No. 86; Pls.' Post-Trial Br. at 30, ECF No. 105).

the VRA). Indeed, "the [VRA] and our case law make clear that a reapportionment plan that satisfies [Section] 5 still may be enjoined as unconstitutional," as Section 5 does not "give covered jurisdictions carte blanche to engage in racial gerrymandering in the name of nonretrogression." *Shaw I*, 509 U.S. at 654-55.

In *Alabama*, the Court made clear that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in majority-minority districts. 135 S. Ct. at 1272. Rather, Section 5 requires legislatures to ask the following question: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect its candidate of choice?" *Id.* at 1274. Although "we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive," the legislature must have a "strong basis in evidence" for its use of racial classifications. *Id.* at 1273-74. Specifically, the Court in *Alabama* noted that it would be inappropriate for a legislature to "rel[y] heavily upon a mechanically numerical view as to what counts as forbidden retrogression. " *Id.* at 1273. For example, a redistricting plan using racial criteria to maintain the population of African-American voters in a majority-minority district that "has long elected to office black voters' preferred candidate" would not likely be "'narrowly tailored' to achieve a 'compelling state interest[]'" without evidence that any reduction in the minority population would impact African-American voters' ability to elect their preferred candidate. *Id.* As we explain below, the legislature here—by increasing the BVAP of a safe majority-

minority district and using a BVAP threshold—relied heavily on a mechanically numerical view as to what counts as forbidden retrogression without a "strong basis in evidence" for doing so.

a. BVAP Increase in a Safe Majority-Minority District

Although the Third Congressional District has been a safe majority-minority district for 20 years, the 2012 Plan increased the total number of its African-American voting age residents by 44,711.[28] *See* Pls.' Trial Ex. 27, at 11, 14; Trial Tr. 52:18-54:5. This change also increased the district's BVAP from 53.1% to 56,3%. Pls.' Trial Ex. 27, at 14.

Congressman Bobby Scott, a Democrat supported by the majority of African-American voters in the Third Congressional District, was first elected to represent the District in 1992. Pls.' Trial Ex. 21, at 33; Trial Tr. 52:18-24. In the six elections between 2002 to 2012, Congressman Scott ran unopposed in three; he ran opposed in the general elections in 2010 and 2012, but was reelected each time, Pls.' Trial Ex. 27, at 11; Trial Tr. 53:7-22. In 2010, Congressman Scott won 70% of the vote, while in 2012—under the redistricting plan at issue here—he won by an even larger margin, receiving 81.3% of the vote. Pls.' Trial Ex. 27, at 11; Trial Tr. 53:7-22.

In this respect, the legislature's decision to increase the BVAP of the Third Congressional District is similar to the redistricting plan invalidated by the Supreme Court in *Bush*. *See* 517

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[28] African-American voters accounted for over 90% of the voting age residents added to the Third Congressional District. Pls.' Trial Ex. 27, at 14.

U.S. at 983. In *Bush*, a plurality of the Supreme Court held that increasing the BVAP from 35.1% to 50.9% was not narrowly tailored because the state's interest in avoiding retrogression in a district where African-American voters had successfully elected their representatives of choice for two decades did not justify "substantial augmentation" of the BVAP. *Id.* Such an augmentation could not be narrowly tailored to the goal of complying with Section 5 because there was "no basis for concluding that the *increase* to a 50.9% African-American population . . . was necessary to ensure nonretrogression." *Id.* "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Id.* While the BVAP increase here is smaller than that in *Bush*, the principle is the same. Defendants show no basis for concluding that an augmentation of the Third Congressional District's BVAP to 56.3% was narrowly tailored when the district had been a safe majority-minority district for two decades.

b. BVAP Threshold

At trial, Defendants' expert, Mr. Morgan, confirmed that the legislature adopted a floor of 55% BVAP for the Third Congressional District throughout the 2011-12 redistricting cycle. *See* Int.-Defs.' Trial Ex. 13, at 26-27. This BVAP threshold was viewed as a proxy for the racial composition needed for a majority-minority district to achieve DOJ preclearance. *See id.* at 26. Thus, the legislature altered the Third Congressional District's boundaries in order to meet or exceed that threshold. *See id.* at

26-27 (noting that legislators "viewed the 55% black VAP . . . . as appropriate to obtain Section 5 preclearance, even if it meant raising the Black VAP above the levels in the benchmark plan").

Similar ad hoc uses of racial thresholds have been rejected under a narrow tailoring analysis by other three-judge courts. For example, one court invalidated a plan implementing a 55% threshold as arbitrary without supporting evidence. *See Smith*, 946 F. Supp. at 1210 (holding that narrow tailoring requires legislatures to consider the fact that a 55% BVAP will not be needed to elect a candidate of choice in districts where most minority citizens register and vote, and cautioning against "insist[ing] that all majority-minority districts have at least 55% BVAP with no evidence as to registration or voter turnout"). The legislature's use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns, suggests that voting patterns in the Third Congressional District were not "considered individually." *Id.*[29] Considering the foregoing factors, we conclude that the 2012 Plan was not narrowly tailored to achieve compliance with Section 5, and therefore fails strict scrutiny.

III. REMEDY

Having found that the 2012 Plan violates the Equal Protection Clause, we now address the appropriate remedy. We are conscious of the powerful concerns for comity involved in interfering with the state's legislative responsibilities. As the Supreme

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[29] We pause to clarify that, while the legislature did not conduct a racial bloc voting analysis in enacting the 2012 Plan, we do not find that one is always necessary to support a narrow tailoring argument.

Court has repeatedly recognized, "redistricting and reapportioning legislative bodies is a legislative task, which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). As such, it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise . . . its own plan." *Id.* at 540.

We also recognize that individuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm. Those citizens "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981). Therefore, we will require that new districts be drawn forthwith to remedy the unconstitutional districts. In accordance with well-established precedent that a state should have the first opportunity to create a constitutional redistricting plan, *see, e.g.*, *Wise*, 437 U.S. at 539-40, we allow the legislature until September 1, 2015, to enact a remedial districting plan.

IV. CONCLUSION

Because Plaintiffs have shown that race predominated in Virginia's 2012 Plan, and because Defendants have failed to establish that this race-based redistricting satisfies strict scrutiny, we find that the 2012 Plan is unconstitutional, and will require the Commonwealth to draw a new congressional district plan.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record. An appropriate order shall issue.

It is so ORDERED.

/s/
Allyson K. Duncan
United States Circuit Judge

/s/
Liam O'Grady
United States District Judge

Richmond, Virginia
Date: June 5, 2015

PAYNE, Senior District Judge, Dissenting,

I, like the majority, have reassessed the record in perspective of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*Alabama*," 135 S. Ct. at ____) and the Supreme Court's remand order. In my view, the original majority opinion, like the original dissent, applied the proper analytic framework as specified by *Alabama*.[30] Sof too, do the majority opinion and the dissent following remand. And, although I respect very much the views of the record expressed by my good colleagues in the majority, I am unable to join them because I understand the record quite differently. Based on that understanding and for the reasons set forth below, I respectfully dissent.

I.

The majority and I do not differ on the fundamental legal principles that apply here. I think that we all recognize that " [f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Accordingly, "[t]he courts . . . must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Id.* at 915-16. Moreover, the redistricting enactments of a legislature are entitled to a presumption of good faith, and the judiciary must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the

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[30] As the majority notes, the Defendants did not appeal our original decision. I find that to be of no moment given the change of political parties in Virginia's executive branch during the pendency of the case and considering the political implications of the case.

basis of race." *Id.* at 916; *see also Easley v. Cromartie*, 532 U.S. 234, 257 (2001). I understand *Miller* and *Easley* to mean that courts must presume that a state legislature has not used race as the predominating factor in making its redistricting decisions because to do so would not be redistricting in good faith.

It is up to the Plaintiffs to dislodge that presumption by proving that the legislature subordinated traditional race-neutral redistricting principles to racial considerations and that race was the predominant factor in the redistricting decision at issue. *Id.* This is a "demanding" burden that cannot be satisfied by a mere showing that the legislature was conscious of the racial effects of redistricting or considered race as one factor among several; what is required is proof that the racial considerations were "dominant and controlling." *Easley*, 532 U.S. at 257. If the Plaintiffs meet their burden, then the challenged district will be subject to strict scrutiny, but "strict scrutiny does not apply merely because redistricting is performed with consciousness of race," *Bush v. Vera*, 517 U.S. 952, 958 (1996).[31]

As I understand the record, the redistricting decision here was driven by a desire to protect incumbents and by the application of traditional redistricting precepts even though race was

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[31] The majority comments that this case is a "mixed motive suit" involving both race-based and race-neutral redistricting factors. At the most basic level, and for the reasons explained below, I agree with that characterization as a general proposition. However, I do not find any basis in precedent to conclude that applying the "mixed motive suit" label changes anything in the basic analysis. The applicable test remains whether race predominated in the decision-making process.

considered because the legislature had to be certain that the plan complied with federal law, including the Voting Rights Act of 1965 [32] ("VRA") and, in particular, the non-retrogression provision of Section 5 of the VRA. [33] But, wholly apart from that conclusion, I do not believe that the Plaintiffs' have carried their demanding burden to prove that the predominant factor in creating Congressional District 3 ("C.D.3").

II.

The Plaintiffs, like the majority, base their conclusions on the predominance issue on: (1) the views of the Plaintiffs' expert witness, Dr. Michael P. McDonald; and (2) direct evidence consisting principally of statements made by the Delegate Bill Janis, the sponsor of the redistricting language, a legislative resolution, and the existence of a perceived

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[32] 42 U.S.C. §§ 1973-1973bb-1.

[33] In *Hunt v. Cromartie*, the Supreme Court observed that "a jurisdiction may engage in *constitutional* political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." 526 U.S. 541, 551 (1999) (first emphasis added). In a footnote following that statement, the Court "recognized, however, that political gerrymandering claims are justiciable under the Equal Protection Clause although we [are] not in agreement as to the standards that would govern such a claim." *Id.* at n.7. Because the parties did not raise the issue of political gerrymandering or whether the Defendants' asserted interest in "incumbency protection" is permissible on these facts, I do not reach the issue here. I only find that political considerations and traditional redistricting factors outweighed racial considerations based on the facts before the Court and, therefore, a claim of *racial* gerrymandering must fail.

racial quota.[34] My understanding of the record on these topics is set forth below.

A. Dr. Michael P. McDonald: Generally

To prove that race was a predominant factor in the redistricting decision, the Plaintiffs relied principally upon their expert witness, Dr. Michael P. McDonald. In Section II.F below, I will address the details of McDonald's testimony and his report on which the Plaintiffs and the majority rely, but there is a more basic point about McDonald's credibility that I think needs to be addressed first and separately.

In this case, McDonald took the view that race was the predominant factor in the redistricting of C.D.3 but, in March 2013, before McDonald had been retained as an expert in this case, he was a co-author of a scholarly article published in the University of Richmond Law Review in which he made the case rather clearly that the animating consideration in the 2012 redistricting was the protection of incumbents. Micah Altman and Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting From Rural Malapportionment to Voting Rights to Public Participation*, 47 U. Rich. L. Rev. 771 (2013).

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[34] In the original Memorandum Opinion, the majority found that there was an admission by the Defendants that "compliance with Section 5 of the VRA . . ., and accordingly race 'was the [legislature's] predominant purpose . . . underlying [the Third Congressional District's] racial composition in 2012.'" *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *7 (E.D. Va. Oct. 7, 2014) (*Page*, at *7). In dissent, I made the point that there was no such admission. *Page*, at *20 (A. The Perceived Admission)). On remand, the majority no longer relies on the perceived admission. Thus, in this dissent, it is no longer necessary to address that finding.

That article begins with the statement that:

> In the 2012 general election, Virginia Republican candidates for the United States House of Representatives won a combined 70,736 more votes than Democratic candidates out of the 3.7 million votes cast for the major party candidates, yet won eight of the state's eleven House seats. Thus, is the power of gerrymandering.

Id. at 772. The paragraph then continues to outline the various factors often considered in the redistricting process and, after reciting those factors, the article observed that "these administrative goals [traditional redistricting principles][35] are nominally devoid of political considerations, *but such considerations are at the forefront* for those who conduct redistricting." *Id.*

Later, the article explained that:

> While the General Assembly was able to reach a bipartisan compromise to redistrict the two [General Assembly] chambers controlled by different political parties, it was unable to reach agreement on a congressional plan. The sticking point was whether to protect all incumbents, giving the Republicans an 8-3 edge among the state's eleven districts, or to restore the African-American population to the Fourth Congressional District that had been shifted to the Third Congressional District during the last redistricting, yielding a Democratic-leaning Fourth Congressional District with 45% African-

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[35] At trial, McDonald confirmed that this term "administrative goals" meant "traditional redistricting principles." Trial Tr. 132.

> American voting-age population and reducing the Republicans' edge to 7-4. After the November 2011 elections, when Republicans gained a working majority in the Senate, the General Assembly passed the congressional plan that protected all incumbents including the eight Republicans.

Id. at 795-96.

McDonald was asked at trial about that statement in his article:

> Q. So the fight was about whether or not they were going to endanger Republican incumbent Forbes in District 4 by shifting BVAP from District 3 in a way that would turn it into a Democratic-leaning district, correct?
>
> A. Yes.
>
> Q. And it was because of that desire to protect the incumbent and maintain a Republican 8-3 advantage that the Republicans in the General Assembly opposed it, right?
>
> A. Right.

Trial Tr. 143-44.[36]

In his article, McDonald also said that:

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[36] At trial McDonald sought to mitigate the effect of his answer by saying that there were footnotes in his article indicating that he simply was characterizing what was in the popular press at the time. Trial Tr. 144-45. McDonald was shown the articles which did not support his effort to ameliorate his testimony that he was merely quoting the press. McDonald Trial Tr., pp. 146-147. And, a reading of McDonald's article as a whole utterly refutes his effort to make such a point.

> In the legislature, two competing plans emerged: one from Republicans, who favored a 8-3 partisan division of the state that protected all incumbents and one by the Democrats, which a 7-4 partisan division. The partisan contention involved the Fourth Congressional District represented by Republican incumbent Randy Forbes. Democrats wished to fashion this district into a roughly 45% African-American district – sometimes called a 'minority-influenced' district – that would likely elect a Democrat while Republicans wish to preserve the districts' Republican character.

Intervenor-Defendants Ex. 55, pp. 19-20; *see* Trial Tr. 150-52. McDonald was questioned at trial about those statements from his article:

> Q. The Republicans did not want to change District 3 by transferring BVAP [37] into District 4 for political reasons; correct?
>
> A. Mostly, yes.
>
> * * *
>
> Q. Both politics and incumbency protection are nonracial reasons; correct?
>
> A. Yes. They can be yes.
>
> Q. And you have no reason to think they weren't here.
>
> A. No, I do not.

Trial Tr. 151-52.

On cross-examination, McDonald was asked:

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[37] The term "BVAP" is an acronym for Black Voting Age Population.

> Q. When you were looking at it as a disinterested academic, you determined that it was a political gerrymander by the General Assembly, correct?
>
> A. Yes, we evaluated the partisan performance of the districts and had determined that the intent was to create an 8-3 Republican majority.

Id. at 129.

He was then asked this question:

> Q. So they purposely enhanced Republican voting power or preserved it at eight for political purposes, correct?
>
> A. Yes.

Id. at 130.

McDonald was also questioned about a number of statements in the article respecting the basis for the adoption of the redistricting plan here at issue and about competing plans discussed in the article and then was asked whether "the basis for your conclusion [in the article] that the 8-3 [eight Republicans and three Democrats] was the result of conscious decision-making by the legislature because these other plans with similar characteristics had only produced a 6-5 Republican advantage?" to which McDonald answered: "we were using these comparisons to draw this conclusion, yes." Trial Tr. 136-37.[38]

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[38] At trial, McDonald appended to several answers the phrase "but with a caveat." When asked what that caveat was, he explained that it was the rare instance "when candidates can win in districts that are of the other political persuasion." Trial Tr. 124. However, McDonald acknowledged later that neither

Certainly, if McDonald's careful study, as reported in his article, had shown that race was the predominant factor in the redistricting he would have said so. Instead, he said that incumbent protection drove the process and the results. And, his article devoted sixty pages (and 27,228 words) demonstrating that point and analyzing how other plans could have achieved a different political line up.

Having previously taken the view in a scholarly publication that the 2012 redistricting was driven by the desire to protect incumbents, it lies not in the mouth of McDonald now to say that race, not protection of incumbents, was the predominant reason for the 2012 redistricting. I simply cannot countenance, as a finder-of-fact, such a 180 degree reversal on a key issue. I conclude that McDonald's views, in whole and in its constituent parts, are not entitled to any credibility.

B. Statements Made By Delegate Janis

Delegate William Janis was the author of the redistricting plan at issue here. The Plaintiffs, and the majority, rely heavily on certain statements made by Janis in the floor debates over the plan to support their view that race was the predominant factor in the redistricting of C.D.3. I do not understand the statements made by Janis when considered as a whole, to support, much less prove, such a conclusion.

To understand what Janis had to say about the redistricting plan that he formulated, it is important to view what he said in context and to consider the statements as part of a cohesive whole. Of course, it

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he nor, to his knowledge, anyone else had done any analysis on the basis of that caveat. *Id.*

is not possible here to recite all of the statements that Janis made in the floor debates. Thus, I will focus on the ones that seem to be most comprehensive. Unfortunately, that exercise will take some space but, it is, I think, an important one. I do not repeat here the passages already cited by the majority, but I have taken them into account in my assessment of what Janis meant in all the statements that he made considered as a whole.

When the bill was first presented in April 2011, Janis outlined the several criteria on which he had based the bill in which the plan was set out.[39] He began:

> First, and most importantly, the districts that were drawn to 3rd Congressional District conform [sic] to the mandates of the United States Constitution and the Constitution of Virginia, and specifically to comply with the one-person-one-vote rule, which occurs in both these Constitutional documents.

Pl's. 43, p. 3. Janis went on to explain that meeting those objectives was a significant challenge because of the "dramatic and non-uniform shifts in population in the Commonwealth over the past three years." *Id.*

Janis next explained that:

> [t]he second criteria [sic] that's applied in House Bill 5004 is that the districts were drawn to conform with all mandates of federal law, and, most notably, the Voting Rights Act. The Voting Rights Act mandates that there be no retrogression in minority voter influence in the

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[39] As the majority notes, the bill ultimately was enacted in 2012 without any significant change.

> 3rd Congressional District, and House Bill 5004 accomplishes that.

Id. Then, Janis recited that:

> [t]hird, the districts were drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections. And these districts are based on the core of the existing congressional districts with the minimal amount of change or disruption to the current boundary lines, consistent with the need to expand or contract the territory of each district to reflect the results of the 2010 census and to ensure that each district had the right 727,365 benchmark.

Id. at 4. According to Janis:

> House Bill 5004 respects the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together. And it attempts to do this while still making sure that we comply with the constitutional mandate and the federal law mandates.

Id. Janis' explanation continued with the observation that:

> We also attempt to keep together jurisdictions and localities, counties, cities, and towns. We try either to keep them intact or, in some cases, reunite counties, cities, or towns that were splintered in previous redistricting plans.
>
> * * *
>
> Whenever possible, the plan also seeks to preserve existing local communities of interest,

> and, in some cases, to reunite such communities that may have been fractured in the course of previous reapportionment plans, most notably, Reston in northern Virginia.

Id. at 5. Then Janis pointed out that the plan was based in part on the views of Virginia's Congressional representatives respecting the configuration of their districts, stating:

> The district boundary lines were drawn based in part on specific and detailed recommendations that were provided by each of the 11 current members of the United States Congress in the Virginia delegation.
>
> * * *
>
> I have personally spoken with each member of the Virginia congressional delegation, both Republican and Democrat, and they have each confirmed for me and assured me that the lines for their congressional district as they appear in this legislation conform to the recommendations that they provided.

Id. at 5-6. To summarize, Janis stated:

> That's why we drew the lines this way was to, [sic] to the greatest degree possible, conform with the United States Constitution and federal law and pursuant to the significant population shifts over the last ten years, to respect the core of the existing congressional district boundaries with the least amount of disruption in the continuity of representation on the part of the constituents of these districts.

Id. at 6.

After making his presentation, Janis received questions from Delegate Ward Armstrong, who was the House of Delegates Minority Leader and the principal spokesperson for the Democrats in the House of Delegates when it was considering the Congressional redistricting legislation. In one of those questions, Armstrong asked Janis to explain what criteria were used to arrive at the redistricting plan other than the VRA and the one-person-one-vote criteria. To that, Janis responded as follows:

> The first criteria [sic] that we applied was, it had to comply with all mandates of the United States Constitution and the Constitution of Virginia, more especially it must comply with the one-person-one-vote rule as interpreted by appropriate case law . . . .

Id. at 18.

> Second, that it was drawn to conform with all mandates of federal law, and most notably the Voting Rights Act and most specifically, that it follow a zero-variance rule, which is the 727,365 rule, and also that there be no retrogression in the minority voter influence in the 3rd Congressional District.
>
> Those are the mandatory criteria that are not permissive, that there is no discretion in the application of those.
>
> Then, consistent with those criteria and the 2010 census data that mandated significant shifts in population between the various congressional districts, the third criteria that we tried to apply was, to the greatest degree possible, we tried to respect the will of the

> Virginia electorate as it was expressed in the November 2010 congressional elections.
>
> And what that meant was we based the territory of each of the districts on the core of the existing congressional districts. We attempted — I attempted to not disrupt those lines, to the minimum degree possible, consistent with the need to either expand or contract the territory of these districts.
>
> We respected the will of the electorate by not placing — one of the criteria was not placing two congressmen in a district together. And one of the criteria was that we would not take the district lines and draw a congressman out of his existing district.
>
> The last criteria that we applied that was permissive was, to the greatest degree possible, consistent with the constitutional mandates, the federal law mandates, and the population shifts, we attempted to the greatest degree wherever possible not to split counties, cities, and towns, local jurisdictions, and to reunite wherever possible jurisdictions such as Allegheny County, Brunswick County, Caroline County, and the City of Covington.
>
> And then we also tried not to split local communities of interest based on the recommendations we received from the current members of the congressional delegation.

Id. at 19-20.

Armstrong then queried why "it was of any significance whatsoever to contact incumbent members of the U.S. Congress and to gather their

opinion on where the lines should be drawn." *Id.* at 26. To that, Janis responded:

> I didn't believe that it was the — that the purpose of this legislation should be to overturn the will of the electorate as it was expressed in 2010.
>
> And you've got members of the current congressional delegation that have served for one year, and you've got members of the delegation that have served for 20 years, and everything in between. And when looking for input as to how to best preserve local communities of interest—local jurisdictions and localities are easy to see because they're on a map, but local communities of interest are not readily self-evident on a map—that it was relevant and it was reasonable to seek input and recommendations from those current congressmen because not only do they know the local communities of interest, but the local communities of interest know them and have elected them to public office.

Id.

In response to that explanation, Armstrong asked: "would the gentleman then admit that incumbency protection was one of the permissive criteria that he utilized in the development of HB 5004?" *Id.* at 27. Janis responded:

> Well, I would say that, as one member of the congressional delegation said, incumbency protection is how this has been described in every single newspaper report and every account in every newspaper was that this is an incumbency protection program.

* * *

> And it was—I just didn't think that it was the place of the House of Delegates to thwart the will of the electorate as it was expressed last year by disrupting the current congressional boundaries. And what we tried to do was maintain the core of what those boundaries were under the existing lines.

Id. at 27-28.

Another delegate questioned Janis respecting what he meant by his references to "the will of the electorate based on the 2010 elections." *Id.* at 40. Janis responded:

> I would say to the gentleman that the voters went to the polls in November of 2010 and they elected 11 Congressmen, Republican and Democrat. Some of them they elected for the first time, some of them they elected for the fifth or sixth time.
>
> And these members of the congressional delegation, that one of the criteria that I applied here that is permissive in nature was that we were not going to deliberately — this plan was not going to deliberately lump existing congressmen together and not cut existing congressmen out of their current congressional districts and that this plan was going to try to respect, to the greatest degree possible, consistent with the constitutional mandates and the federal law mandates, most especially the Voting Rights Act, with the core — it would respect the core of the existing congressional districts.

> And that one of the permissive criteria that was applied was that this plan was not going to seek to deliberately re-engineer the map of Virginia in a way that was incompatible with the results of last year's election.

Id. at 40-41.

When considered in context and as a whole, I think that Janis's statements (including those cited by the majority) show that the predominant factor in the redistricting here at issue was protection of incumbents. Those statements also show that traditional redistricting factors played an important role as well. And, they show that, albeit necessarily considered in the process, race was not the predominant factor in the drawing of C.D.3 or otherwise in the redistricting.

With that view of the record, I cannot conclude that the Plaintiffs have met their demanding burden of proof to show that race was the predominant factor.

If, as the majority acknowledges, there were two factors animating "*which* persons were placed *in appropriately apportioned districts*" - incumbency protection and race—then it is necessary to determine how race was considered in order to decide whether it was the predominate factor. *Alabama*, 135 S. Ct. at 1271 (emphasis in original). Here, the record establishes that race was a factor only because federal law required it to be considered. Race, like equal population, is a mandatory consideration because both the Constitution and federal law provide "the background rule[s] against which redistricting takes place." *Id.* But, there is a difference between a State's "paramount concern" with complying with federal law and a State's use of

race as a "predominant criterion" for allocating voters between districts. Acknowledging the former, in my view, does not prove the latter.

C. Janis's Statements About The VRA And Non-Retrogression

The Plaintiffs, and the majority, take the view that Janis's specific reference to the non-retrogression requirement of the VRA and his subsequent reiterations of that requirement's importance in response to questioning in floor debates, *see id.* at 10, 14, and 25, prove that race was the predominant factor. And, I agree that the record is replete with evidence that it was "mandatory" that the redistricting plan "not retrogress in minority voting influence." But none of that lends support to a finding of predominance under *Shaw* because it merely recites the requirements of federal law. I believe that, taken in context, those comments only reflect a more general purpose to avoid violations of federal constitutional law, state constitutional law, and federal statutory law, rather than illustrating the use of race as the predominant factor "motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 928.

It is a truism that "The Supremacy Clause obliges the States to comply with all constitutional exercises of Congress' power." *Bush v. Vera*, 517 U.S. at 991-92; *see also* U.S. Const., Art. VI, cl. 2. The Supremacy Clause also binds the United States to the terms of the United States Constitution. U.S. Const., Art. VI, cl. 2. Notably, Janis's first stated goal included compliance with the United States Constitution, which is mandated by the Supremacy Clause. *Id.* His

second stated goal, of which non-retrogression was an element, was also mandated by the Supremacy Clause.

In any redistricting, compliance with federal statutory and constitutional law is an absolute necessity. For a jurisdiction covered by Section 5 of the VRA, compliance with Section 5 is mandatory—a fact that applies with equal force whether or not a legislator openly acknowledges it. To construe a legislator's (or the legislature's) acknowledgement of the role of the Supremacy Clause as a de facto trigger for strict scrutiny of majority-minority jurisdictions is to place the legislatures and their legislators in a "trap[ ] between the competing hazards of liability." *Bush v. Vera*, 517 U.S. at 992 (O'Connor, J., concurring). Such an interpretation implies that legislatures are always subject to strict scrutiny.[40]

The majority opinion's description of this valid principle, and very real problem, as a "red herring" is based on its misapprehension of what the sentence actually says. Thus, the majority says that "[t]he dissent argues that by subjecting a redistricting plan to strict scrutiny when it separates voters according to race as a means to comply with Section 5 trap[s] [legislatures] between competing hazards of [VRA and Constitutional] liability." That, of course, is not what the dissent actually says. The subject sentence actually says that "[t]o construe a legislator's (or the

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[40] This "trap" is similar to a narrow tailoring requirement that "condemn[s] [a] redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few."). *Alabama*, 135 S. Ct. at 1274.

legislature's) acknowledgement of the role of the Supremacy Clause as a de facto trigger for strict scrutiny" places them in a trap like that in *Bush*. Thus, the sentence makes the point that it is not right to animate strict scrutiny because a legislator, or the legislature, acknowledges the role of the Supremacy Clause in redistricting. That is a far different matter than subjecting a redistricting plan to strict scrutiny because it predominantly separates voters according to race. The Supreme Court has never held that the intentional use of race in redistricting, taken alone, triggers strict scrutiny. *See Alabama*, 135 S. Ct. at 1272 (noting that the majority "does not express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny").

To be sure, the Supremacy Clause and the application of Section 5 provide the potential for traditional redistricting criteria to be subordinated to race. But I read the Supreme Court's precedent as demanding *actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former, rather than a merely hypothetical conflict that *per force* results in the conclusion that the traditional criteria have been subordinated to race. *Cf. Miller*, 515 U.S. at 928-29 ("Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process."). And, on the facts before us,

where the Enacted Plan improves upon the Benchmark Plan in certain traditional criteria, *see* Pl's Exh. 43, at 5, and all Congressional incumbents have personally indicated their satisfaction that the Enacted Plan conforms with their political interests, *see id.* at 5-6, and both experts in this case agree that the General Assembly had political reasons to make the changed embodied in the Enacted Plan regardless of the race of the affected voters, *see* Trial Tr. at 128-29 (McDonald), 266 (Morgan), I cannot conclude that Janis's statements about the VRA and non-retrogression show, or even tend to prove, that the traditional criteria were actually subordinated to race in the creation of the C.D.3.

D. The Senate Resolution

Like the Plaintiffs, the majority points to a Virginia Senate Resolution as evidence that race was given priority over all other redistricting considerations. The resolution provides that "population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 *shall be given priority in the event of conflict* among the [previously enumerated redistricting] criteria." Pl's Ex. 5, p. 2, ¶ VI (emphasis added).

As explained above, it is both necessary, and unremarkable, that a state legislature would recognize its obligations under, and the effect of, the Supremacy Clause. And, I do not see how the recognition of that obligation could support, or tend to prove, a finding that race was the predominant reason for the particular lines implemented in the Enacted Plan. More importantly for today's case, the resolution establishes a priority in the event of a

conflict, and I can find nothing in the record to suggest that there was a conflict between, or among, the criteria outlined in the resolution. Nor does it appear from the record that the legislature considered that there was conflict. Hence, there never arose a need to resort to the priority clause of the resolution.

E. The Perceived Racial Quota

Next, the Plaintiffs have argued, and the majority has found, that the General Assembly imposed a 55 percent Black Voting Age Population ("BVAP") quota for the C.D.3. The support for this view is a patchwork quilt of statements made by Morgan and Virginia's Section 5 pre-clearance submission to the Department of Justice. *See* Pl's Post-Trial Br. at 7-9. However, in the final analysis, I do not think that the statements by Morgan or the Section 5 submission carry the weight ascribed to them.

The Section 5 submission merely states, as a factual matter, that the proportion of African-Americans in the total and voting age population in C.D.3 had been increased to over 55 percent. *See* Pl's Exh. 6, at 2. That, to me, is an objective description of a legislative outcome, rather than a declaration of subjective legislative intent or any evidence of a predetermined quota.

Morgan's expert report stated that "the General Assembly enacted . . . . a House of Delegates redistricting plan [a plan for seats in the General Assembly] with a 55% Black VAP as the floor for black-majority districts subject to Justice Department preclearance under Section 5." Int. Def's Exh. 13, at 26. Again, this statement pertains to a different redistricting plan [the state House of

Delegates plan], and gives no indication of whether the "floor" was a predetermined quota or an after-the-fact description of the districts that were contained in the enacted House of Delegates plan. Morgan went on to write that "the General Assembly had ample reason[41] to believe that legislators of both parties . . . viewed the 55% VAP for the House of Delegates districts as appropriate to obtain Section 5 preclearance," and that "[t]he General Assembly acted in accordance with that view for the congressional districts." *Id.* at 26-27. While these statements suggest that, in Morgan's view, the General Assembly looked favorably upon a plan with a BVAP greater than 55 percent, they do not go so far as to show that the legislature imposed a predetermined quota of 55 percent BVAP that predominated over every other redistricting criterion in effecting the Congressional redistricting here at issue.

Janis's public statements, on the other hand, suggest that the true starting point for the changes to C.D.3 was the recommendations provided by Virginian Congressmen before any assessment of the effect of those changes on the District's BVAP. *Compare* Pl's Exh. 13, at 11 (discussing input from Congressmen Scott and Forbes on the boundaries between C.D.3 and C.D.4) *with* Int. Def's Exh. 10 (discussing analysis of previously proposed changes

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[41] That was so, said Morgan, because the General Assembly previously had "enacted, with strong support of bipartisan and black legislators, a House of Delegates redistricting plan with a 55% BVAP as the floor for black-majority districts, subject to Justice Department preclearance under Section 5, including districts within the geography covered by Congressional District 3." *Id.*

to verify that they did not lead to retrogression). Rather than indicating that race was the predominant factor or the subject of a hard quota, this sequence of legislative drafting suggests only that Janis was conscious of the possible effects on racial demographics and potential for Section 5 preclearance. And "strict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Bush v. Vera*, 517 U.S. at 958.

Significantly, prominent opponents of the Enacted Plan opposed it because it provided incumbent protection, not because it was the product of adopting a racial quota. Senator Locke, the sponsor of a rival redistricting plan, stated on the floor of the Virginia Senate that, "I stand in opposition to this legislation, which clearly is designed to protect incumbents." Va. S. Sess. Tr., (Jan. 20, 2012), Pl's Exh. 47, at 15. Senator Locke later reiterated her belief that "this plan is not about the citizens of the [C]ommonwealth but about protecting individuals who currently hold the office." *Id.* at 16. Delegate Armstrong, the minority leader in the Virginia House of Delegates, stated unequivocally, "The exercise is one for incumbency protection first, last, alpha, and omega." Va. HB 5004, 1st Spec. Sess. Tr. (Apr. 12, 2011), Pl's Exh. 43, at 48-49.

Delegate Morrissey compared the requests for redistricting input from incumbents to asking a professional football team where it would like the ball to be placed before a crucial play. *Id.* at 44-45. In Morrissey's view, "We're not here to protect [incumbent] Congressman Connelly [sic] or Congressman Herd [sic]. We're here to do the people's business and to protect their interest." *Id.* at 45.

Because the redistricting bill protected incumbents, he was opposed to it.

Notwithstanding the fact that these opponents of the Enacted Plan had every reason to characterize the Enacted Plan in the harshest terms possible (*i.e.*, as race driven or as the product of a racial quota), they did not do so. The record proves that was because they saw the plan as driven by the goal of incumbency protection rather than as racial gerrymandering.

I am aware of the decisions that give little, to no, weight to statements made by the opponents of legislation. *See Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1998); *N.L.R.B. v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951). That authority exists because opponents are thought often to be motivated to make the worst possible case against the piece of legislation under debate and thus their views are of little effect in interpreting the legislation. Those authorities do not apply here to bar consideration of the opponent's views because we are not involved here in the interpretation of a law. Rather, we are seeking to determine which factors were most predominant in crafting the particular boundaries of C.D.3. And, I think, we can assume that the opponents would have condemned the Enacted Plan as race driven had they thought that to be the case. A "race driven" plan is surely as objectionable as an "incumbency driven" plan, and the majority agrees that the "bill's opponents have every incentive to place a competing label on a statute they find objectionable." So when the opponents labeled the Enacted Plan as an

incumbency protection plan, we can take their views into account.

In that regard, it is important to recall that the most salient difference between the Enacted Plan and Senator Locke's alternative redistricting plan was not the proportion of African-Americans in C.D.3, but whether one of the districts then held by a Republican incumbent would be transformed into a Democrat-leaning district. As the Plaintiff's own expert, McDonald, wrote last year:

> The sticking point was whether to protect all incumbents, giving the Republicans an 8-3 edge among the state's eleven districts, or to restore the African-American population to the Fourth Congressional District that had been shifted to the Third Congressional District during the last redistricting, yielding a Democratic-leaning Fourth Congressional District with 45% African American voting-age population and reducing the Republicans' edge to 7-4. After the November 2011 elections, when Republicans gained a working majority, in the Senate, the General Assembly passed the congressional plan that protected all incumbents including the eight Republicans.

McDonald, *supra*, at 796-97. This assessment, offered in a scholarly publication a year after the Enacted Plan was signed into law, severely damages the credibility of McDonald's subsequent testimony that "race trumped politics" in the drawing of the Enacted C.D.3. *See* Trial Tr. 88. Perhaps more importantly, however, McDonald's article demonstrates that even redistricting experts writing with the benefit of hindsight believed that the choice of redistricting

plans was driven by issues of incumbency protection and partisan balance. Given that observation, there is ample reason to conclude that Janis and other legislators were animated in their redistricting decisions by incumbency protection and partisan advantage.

For those reasons, I do not consider that the Plaintiffs proved their racial quota argument.

F. McDonald's Opinions: Circumstantial Evidence

In their presentation of the circumstantial evidence thought to support proof of a racial gerrymander, the Plaintiffs have relied on McDonald's opinion and report. [42] And, as I understand it, the majority relies heavily on the exhibits prepared by McDonald and his testimony about them when assessing the Plaintiffs' circumstantial evidence thought to show that race was the predominant factor in drawing C.D.3.

In reaching his conclusion that the race was the predominant factor in the creation of the Enacted Plan and the drawing of C.D.3, McDonald analyzed the racial composition of populations that moved in and out of C.D.3, the compactness of the district, the overall shape of the district (including the use of water to bypass racial communities while maintaining technical contiguity), and the number of precinct and locality boundaries that were "split" by

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[42] McDonald's report and its exhibits (like that of the Defendants' expert, John Morgan) were admitted into evidence by agreement, notwithstanding that expert reports are hearsay and hence not admissible usually.

the Enacted Plan. *See* Trial Tr. 72. I will address each of these factors in turn.

But, before doing so, I reiterate that, for the reasons set out in Section II.A, I would give no credence to any part of McDonald's testimony or report. However, because the Plaintiffs' case, like the majority opinion, depends on McDonald's views on these topics, I think it is wise to address them, wholly apart from my view of his credibility. Thus, I turn now to the elements of what the majority calls "Circumstantial Evidence of the Third Congressional District's Shape and Characteristics." In so doing, I discuss, as has the majority, each point individually but assess them as a whole.

1. Population Swaps—Racial Composition

The Enacted Plan incorporated a number of population swaps between C.D.3 and the surrounding Congressional districts. McDonald testified that the effect of these various swaps was to remove areas with a comparatively low BVAP from C.D.3 and add areas with a comparatively higher BVAP into C.D.3. Trial Tr. 82-87; Pl's Exh. 27, at 15, Table 6. Even if we assume that point to be accurate, it does little to prove that race was the predominant factor in the redistricting because, "[i]n a case . . . where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation," *Easley*, 532 U.S. at 258, a simple analysis demonstrating that blacks are disproportionately likely to be moved into a particular legislative district is insufficient to prove a claim of racial gerrymandering. As Morgan explained, the Enacted Plan treats District 3 the same way as the majority-white districts by preserving its essential core and

making relatively minimal changes to benefit incumbents in District three and adjacent districts. Trial Tr. 256.

Neither party disputes that racial identification correlates highly with political affiliation in C.D.3 and surrounding areas. And, the record shows that the Democrat vote share of local voting tabulation districts (VTDs) can generally be predicted simply by taking the BVAP of a VTD and adding about 21 percentage points. *See* Pl's Exh. 57, Table 2 (reflecting the analysis of the Plaintiff's expert and showing that most VTDs have a Democrat vote share 20-22 points higher than their BVAP); Int. Def's Corrected Exh. 50, Table 1 (reflecting the analysis of the Defendants' expert and showing the same correlation between BVAP and Democrat vote performance).

The majority finds fault with this analysis because it is, in their view, "precisely the sort of race-biased consideration the Supreme Court has confirmed triggers strict scrutiny." (citing *Bush v. Vera*, 517 U.S. at 968; and *Shaw I*, 509 U.S. at 653). However, the analysis of racial correlation and political affiliation here is based on facts in the record: the Plaintiffs' own expert, the Defendants' expert, and the results of the most recent presidential election. Hence, this case does not present the racial stereotyping that *Bush* and *Shaw I* rightly prohibit. And that fact-based correlation between race and political affiliation has significance. That is because the proven correlation requires that "the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably

consistent with traditional districting principles." *Easley*, 532 U.S. at 258.

It is not, I think, disputed by anyone that, at least, one of the political objectives articulated in the Virginia legislature was incumbent protection, which directly implicated the partisan performance of the various Congressional Districts. McDonald purportedly tested these "political considerations" to determine whether they could explain the changes to C.D.3, and concluded that "race trumped politics." *See* Trial Tr. 87-88. But McDonald's test is simply too crude to support such a conclusion, as McDonald's own follow-up analysis demonstrates.

McDonald initially created a set of VTDs drawn from every locality that was partially or completely contained within the Benchmark C.D.3. *See* Trial Tr. 88. To that set, he added the VTDs from every locality adjacent to the Benchmark C.D.3. *Id.* McDonald isolated those VTDs where Democrats averaged 55 percent of the vote or more, and then compared the "highly Democrat VTDs" that were placed within the Enacted C.D.3 with those that were placed in other districts. *Id.* at 88-89. McDonald found that the highly Democrat VTDs placed within C.D.3. possessed a higher BVAP than their counterpart VTDs outside C.D.3, *Id.* at 89; Pl's Exh. 28, at 8 (finding an average BVAP of 59.5% for highly Democrat VTDs within the Enacted C.D.3 and an average BVAP of 43.5% for highly Democrat VTDs outside the Enacted C.D.3). From this finding, McDonald inferred that race predominated over politics in the selection of VTDs for inclusion in the Enacted C.D.3.

McDonald's analysis suffers from two major deficiencies. First, he made no distinction between VTDs that were already within the pre-existing boundaries of C.D.3 and VTDs that were outside the boundaries of C.D.3. McDonald's analysis assumes that, but for partisan performance, a VTD in the inner core of the old C.D.3 is no more likely to be included in the new C.D.3 than a VTD thirty miles outside the old C.D.3. This assumption can be valid only if the redistricting legislature gave no value to the goals of preserving district cores and protecting the pre-existing communities of interest formed within those cores. However, the record makes it clear that the legislature, in fact, did assign substantial value to those traditional districting criteria. And, the record shows that, of the 189 highly Democrat VTDs assigned to the Enacted C.D.3, 159 were also included in the Benchmark C.D.3. Those 159 VTDs had an average BVAP of 60%. On this record, and considering the voting performance data from past presidential elections, it should not come as a surprise that a pre-existing majority-minority Congressional district would have a higher average BVAP in its highly Democrat VTDs than the surrounding localities, and evidence to that effect does not demonstrate that the changes to the Benchmark C.D.3, a pre-existing majority-minority district, were predominately motivated by race.

The second problem with McDonald's analysis and testimony is that, although the highly Democrat VTDs within C.D.3 had a higher average BVAP, they were also on average more highly Democrat. Plaintiffs' own Exhibit 57 shows that, while the highly Democrat VTDs within C.D.3 had a BVAP 16 percentage points greater, they also performed 15.5

percentage points better for Democrat candidates. Thus, placing those VTDs within C.D.3 and keeping them out of the surrounding Congressional districts would serve the purpose of protecting incumbents (the Democrat incumbent in C.D.3, the Republican incumbents in C.D.1, C.D.4, C.D.7, and especially C.D.2) to a greater degree than would be possible if the lower BVAP, less highly Democrat VTDs were also placed within C.D.3.

When their own evidence shows that the selection of highly Democrat VTDs does as much to further the race-neutral political goal of incumbency protection as it does to increase the proportion of minorities within the district, the Plaintiffs cannot be said to have carried their burden to show that race predominated over politics, and certainly not through McDonald's VTD analysis.[43] As in *Backus v. South*

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[43] The Plaintiffs have placed great importance on five highly Democrat VTDs that were removed from the Benchmark C.D.3. *See* Trial Tr. 411-14; Pl's Post-Trial Reply, at 7-9 & n.4. These VTDs, however, were substantially less Democrat (19.2 percentage points) than the highly Democratic VTDs added to Benchmark C.D.3, and in fact close to the 55% cutoff selected by the Plaintiffs as the definition of a highly Democrat VTD. See Pl's Exh. 57, Table 2. The Plaintiffs argue that, because the discrepancy in the BVAPs of the added and removed districts (35.9 percentage points) is greater than the discrepancy in the Democrat performance, those five VTDs prove that race predominated over politics.

I can find no basis in precedent for this argument, and as a matter of logic it is a thin reed. There is no dispute that the five VTDs in question are less highly Democrat than their counterparts that were added to the Benchmark C.D.3. There is also no dispute that they have substantially lower BVAPs. Both the Defendants' alleged goals of incumbency protection and the race factor that Plaintiffs allege would have been substantially furthered by these redistricting choices. When both goals are

Carolina, another case in which McDonald's similar testimony was found wanting, this analysis "focuse[s] too much on changes that increased the BVAP in certain [VTDs] and not enough on how traditional race-neutral principles were subordinated to race in making those changes." 857 F. Supp. 2d 553 (D.S.C. 2012) (three-judge court), *summ, aff d*, 133 S.Ct. 156 (2012).

2. Compactness

McDonald also based his opinion on the predominance of race in part on his analysis of C.D.3's compactness. Based on a visual inspection of the district's map and three different statistical measures of compactness (The "Reock" test, the "Polsby-Popper" test, and the "Schwartzberg" test), McDonald testified that C.D.3 "is the least compact district of any district in the Commonwealth of Virginia." Trial Tr. 73. While that assertion seems to be accurate as far as it goes, it does not speak directly to the question whether the district's lack of compactness is constitutionally suspect.

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substantially served by a particular redistricting decision, that decision offers no insight into which goal predominated in the decision-making process. The implication of the Plaintiff's argument is that the Defendants should have compromised their ability to achieve their political goals in order to avoid an even larger racial impact. But that is not the test set forth in *Easley*, and so the five VTDs highlighted by the Plaintiffs do not prove their claim. In fact, the Supreme Court rejected a similar precinct-based argument in *Easley* itself. *See* 532 U.S. at 255 ("First, appellees suggest, without identifying any specific swap, that the legislature could have brought within District 12 several reliably Democratic, primarily white, precincts in Forsyth County. None of these precincts, however, is more reliably Democratic than the precincts immediately adjacent and within District 12.").

An observation that "the Third Congressional District is the least compact congressional district in Virginia" is no more illuminating than an observation that someone is the poorest in a room full of millionaires. A highly compact district in a state that adheres closely to compactness principles may be both the least compact in the state and among the most compact in the nation. None of this is to say that compactness is not a crucial variable in finding circumstantial evidence of racial predominance. It is. But the majority's focus on the *relative* compactness of the district is misplaced.

The badge of "least compact" is especially uninformative here because in all three tests used by McDonald, C.D.3 is the least compact district by the slimmest of margins. *See* Pl's Exh. 27, at 7. On the Reock test, where lower scores are less compact, the scores of Virginia's Congressional Districts range from 0.19 to 0.37, and C.D.3 scores only 0.01 worse than the second-least compact district. *Id.* On the Polsby-Popper Test, where lower scores are less compact, the scores range from 0.08 to 0.26, and C.D.3 scores only 0.01 worse than the second-least compact district. *Id.* On the Schwartzberg test, where higher scores are less compact, the scores range from 1.76 to 3.07, and C.D.3 scores only 0.01 worse than the second-least compact district. *Id.*

But, as McDonald conceded during his testimony, even a difference of 0.03 on the Reock test, 0.03 on the Polsby-Popper test, and 1.03 on the Schwartzberg test does not hold comparative significance under any professional standard. *See* Trial Tr. 217 (testifying about differences in compactness between Enacted C.D.3 and Plaintiff's alternative plan); Pl's Exh. 29, at 7 (quantifying those differences in compactness

scores). Therefore, by McDonald's own logic, C.D.3 is not significantly less compact than some of the other Congressional districts in the Commonwealth of Virginia. Thus, McDonald's compactness contention does not advance the theory that race was the predominant factor in the creation of C.D.3. And, certainly it does not prove the point.

3. VTD And Locality Splits

McDonald also examined the number of VTDs and localities that were "split" by the boundaries of the Enacted C.D.3. He testified that C.D.3 split more VTDs and localities than any other Congressional District in Virginia. Trial Tr. 76-80. *See also* Pl's Exh. 27, at 8-11 (McDonald's expert report). Thereupon, McDonald concluded that C.D.3's position as the leading source of split localities and VTDs indicated that race was the predominant factor in the redistricting of C.D.3.

But, as with his testimony about compactness, McDonald's logic is too sweeping. Unless a state manages to avoid splitting any localities and VTDs (an almost impossible task when combined with the need to achieve perfect population equality between districts), one or more districts will inevitably participate in more splits than other districts. McDonald has not offered any cognizable principle or professional standard that distinguishes between a reasonable distribution of splits between districts and a true outlier indicative of racial gerrymandering. His theorem fails for that reason alone.

Moreover, C.D.3 now splits fewer localities and VTDs than the version of C.D.3 that was struck down in 1997. *See* Pl's Exh. 27, at 8-11 (quoting statistics cited by *Moon v. Meadows*, 952 F.Supp. 1141, 1148

(E.D. Va. 1997)). Similarly, the Enacted Plan splits fewer localities and VTDs statewide than the redistricting plan struck down in 1997. *Id.* The Enacted Plan also splits fewer localities than the Benchmark Plan that was previously in place. Trial Tr. 321. Tellingly, McDonald previously wrote in his article that the Enacted Plan "scored highly" in his regard for its ability to limit the number of split political boundaries. *See* McDonald, *supra*, at 819-20.[44] On this record, I conclude that the number of VTD and locality splits are not probative of the theory that the splits were racially motivated.

4. Contiguity

McDonald conceded that C.D.3 was contiguous, but found fault with the fact that the district was not completely contiguous by land or bridge connections. Trial Tr. 74-76. Specifically, McDonald concluded that C.D.3's use of water connections across the James River to bypass white communities located between Newport News and Hampton showed that traditional redistricting principles had been subordinated to race. *Id.* at 75-76. However, McDonald made no attempt to analyze the political and partisan impact of excluding those white communities, and therefore did not make the necessary showing under *Easley* to demonstrate that these bypasses were created for racial rather than political reasons.

Furthermore, McDonald conceded upon cross-examination that water contiguity without a bridge is

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[44] This is yet another illustration of the facile and malleable quality of McDonald's opinions. When opining before being retained in this case, McDonald's view on the "splits" issue was far different than the one he posits in this case.

permissible in Virginia. Trial Tr. 221. The Virginia Senate Redistricting Criteria adopted in 2011 explicitly stated that, "Contiguity by water is sufficient." Pl's Exh. 5, at 1. And, the Supreme Court of Virginia has held that contiguity by water does not necessarily violate the Constitution of Virginia, reasoning that contiguity by land "is not necessary for exercising the right to vote, does not impact otherwise intact communities of interest, and, in today's world of mass media and technology, is not necessary for communication among the residents of the district or between such residents and their elected representative." *Wilkins v. West*, 571 S.E.2d 100, 109, 264 Va. 447, 463 (Va. 2002). Under these circumstances, the Plaintiffs have not shown that contiguity by water is a violation of traditional redistricting principles in Virginia, let alone that the perceived impermissible form of contiguity was driven by race rather than politics.

5. Population Swaps—Volume

The Plaintiffs have also made an issue of the fact that, although the Benchmark C.D.3 was underpopulated by roughly 63,976 people, the population swaps used to bring the Enacted C.D.3 to par with the other Virginia Congressional Districts involved roughly 180,000 people. *See* Trial Tr. 80-81, 87. The majority too finds this to be evidence in support of a finding that race was the predominant factor in this redistricting.

However, to a large degree, this discrepancy is explained by the changes in Virginia's population over time and the need to minimize split localities. C.D.3 was not the only underpopulated district that needed to be augmented after the 2010 census.

Congressional Districts 2, 5, 6, 8, and 9 were also underpopulated. Trial Tr. 248. District 2, which is adjacent to District 3 and located on the far eastern edge of the Commonwealth, was underpopulated by more than 81,000 people. *Id.* The goal of the population swaps involving C.D.3 was not merely to augment that District's population, but to work in concert with other population swaps to achieve the near-perfect population parity that would satisfy the Constitutional mandate of one-man, one-vote.

The need to achieve population parity between districts was complicated by a simultaneous desire to limit locality splits. The Enacted Plan managed to add precisely 63,976 people to C.D.3 while reducing the number of split localities. *See* Trial Tr. 321. As a matter of logic, it is extremely unlikely that any combination of "whole" localities in the vicinity of Benchmark C.D.3 could have been added to the District to augment the population by exactly 63,976 people, and the Plaintiffs have made no effort to demonstrate the feasibility of that scenario. In order to hit its population target for C.D.3, the Virginia legislature had to either split additional localities or trade complete localities back and forth between districts to achieve the desired net transfer of population. The evidence shows that the Virginia legislature took the latter route, which allowed it to achieve its population target and actually reduce the number of split localities, albeit at the expense of involving more people in the population swaps between districts.

Finally, to the extent that any population swaps cannot be explained by the two factors above, there is nothing about their existence that by themselves indicate that the swaps were racially motivated. That

determination must be made on the basis of other evidence, and the other evidence is insufficient to that end.

6. The Shape Of C.D.3

The shape of a district, if it is bizarre, can be considered as tending to show that race was the predominant factor in drawing the district lines. *See Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 905-906 (1996); Karcher v. Daggett, 462 U.S. 725, 762 (1983); *Miller*, 519 U.S. at 914; *Bush v. Vera*, 517 U.S. at 980-81. The Plaintiffs and the majority take the view that C.D.3 is configured so as to fall within the reach of those decisions.

With respect, when I examined the map that shows all of the Virginia districts (Int. Def's. Ex. 02), I could not conclude that C.D.3 fits the mold of the decisions in which the shape of the district was given such probative effect. C.D.3 is somewhat irregular in shape, but that is true of many of Virginia's nine districts, especially C.D.'s 1, 2, 4 and 7, none of which are accused of being drawn on the basis of race. Moreover, the shape of proposed C.D.3 in the Plaintiffs' Alternative Map is hardly any less irregular than the current shape of C.D.3 or in the Enacted Plan. Thus, on this record, I conclude that the shape of C.D.3 does not tend to prove that race was the predominant factor in drawing the district.

G. The Credibility of John Morgan

The majority questions why I credit the testimony of the Defendants' expert, John Morgan, on a number of points. That question arises because, says the majority, Morgan has no advanced degree, his undergraduate degree was in history, he has never taken a course on statistics, he did not talk to or work

with members of the Virginia legislature and he miscoded some VTD's in his analysis. The majority's query is a fair one and deserves an answer. So too does the record in this case.

To begin, the Plaintiffs accepted Morgan as an expert in demography and redistricting. Trial Tr., p. 241. Second, Morgan has been accepted as an expert in other federal court redistricting cases. Third, his resume shows extensive work in shaping statewide and congressional redistricting plans in nineteen states since 1991. Fourth, he has served as a consultant to redistricting boards or commissions in five states. Fifth, from 1991 to date (excluding a three year tour as Executive Director of GOPAC) he has been employed with Applied Research Associates, a consulting firm specializing in political and demographic analysis and its application to elections and redistricting. Morgan started as a research analyst, became Vice-President in 1999 and has served as the firm's President since 2007. Intervenor-Defendant's Ex. 1.

Sixth, Morgan's undisputed trial testimony shows that he has received formal training in the intricacies of redistricting from the National College of State Legislators, from Republican organizations, and from a vendor of software used in redistricting analysis. Trial Tr., p. 243-244. Seventh, Morgan has trained others in how to draw redistricting plans, and in the process has trained state legislators who are involved in the redistricting process as well as the National College of State Legislators. Trial Tr., p. 244. Eighth, although Morgan did not assist or advise in the development of the redistricting plan at issue here, he did work directly with the Virginia's General Assembly and its counsel in drawing the statewide

redistricting plan in 2011. Ninth, I found him to be knowledgeable about all aspects of redistricting and the demographics related thereto and I found his analysis to make sense and to square with the other evidence in the case. Finally, I adjudged Morgan to be entirely truthful.

I recognize that Morgan made some mistakes in his original assignment of data about VTD's. Those mistakes occurred in the run up to trial when the parties were exchanging data. And, Morgan having candidly acknowledged them, and taken another look at his views in perspective of the correct data, explained that they did not affect his bottom line conclusions even if McDonald's views of the misassigned VTD's were accepted as true. Trial Tr., pp. 391-92. And, in my view, the cross-examination of McDonald in the Plaintiffs' rebuttal case confirmed what Morgan said. Trial Tr., pp. 424-31. In assessing his credibility, I considered the mistake that Morgan made on the misassignment of data, but, because it was an understandable, and honest, mistake of the kind that often happens in the press of litigation, I did not conclude that it undercuts his credibility as a whole and certainly not in the areas cited in this opinion.[45]

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[45] With all his background, training, and experience in demographics and redistricting, I just do not think Morgan's credibility suffers because he did not have an advanced degree, his undergraduate degree was in history, and he has not taken a course in statistics. I have set out above my views on the mistake cited by the majority and have noted his familiarity with Virginia's statewide redistricting.

H. Plaintiffs' Failure To Produce An Adequate Alternative Plan

As part of their effort to show that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles," *Easley*, 532 U.S. at 258, the Plaintiffs proffered an alternative redistricting plan ("Alternative Plan"). The Plaintiffs have not presented any other suggestions for how the legislature could have achieved its stated objectives. Therefore, the Plaintiffs cannot succeed on the merits of their claim unless the Alternative Plan substantially achieves the same political objectives that the legislature achieved through the Enacted Plan and the Enacted C.D.3.

Morgan explained that, under the Benchmark Plan, Congressional District 2 "was a toss-up district," and that the legislature would have had reason to protect the Republican incumbent who had recently been elected in that district. Trial Tr. 258. McDonald agreed that District 2 was a toss-up district over the past ten years and under the Enacted Plan. Trial Tr. 119. Morgan went on to testify that the Plaintiff's Alternative Plan would increase the Democratic vote share in Congressional District 2 from roughly 50 percent to about 55 percent, right at the threshold of what McDonald considered to be a "highly Democrat" area. Trial Tr. 304-05. Not only would this represent the largest political shift in any of the districts redrawn under the Plaintiff's Alternative, but it would be a significant political shift against an incumbent.

McDonald did not dispute Morgan's analysis. In fact, McDonald admitted that the Alternative Plan does not protect all political incumbents:

Q: So the alternative plan subordinates traditional districting principles to race, but unlike the enacted plan, does not further the General Assembly's political goals of having an 8 [Republican]/3 [Democrat] incumbency protection plan; correct?

A: Yes.

Q: Yes, it does not?

A: Yeah. That's why I'm trying to think how to formulate the answer.

Q: And you have no basis for disagreeing with the notion then that the alternative plan moves an overwhelmingly Democratic group into District 2 and moves and evenly divided group out of District 2, do you?

A: No, I do not.

* * * *

Q: And you don't have any basis for disagreeing with the fact that that move converts District 2 from a 50 percent toss-up district to a heavily Democratic 55 percent noncompetitive district, do you?

A: No, I do not.

Q: And if all of that were true, then this would be not only—this would be directly undermining the General Assembly's goals of incumbency protection and maximizing Republican congressional representation; correct?

A: If those were the goals of the General Assembly, yes.

Trial Tr. 180:10-18; 184:10-24. At no point have the Plaintiffs even attempted to explain how an Alternative Map that threatens to unseat a Republican incumbent and create a 7-4 partisan split in Virginia's Congressional Delegation serves the political objectives of the Republican-controlled General Assembly.

If race truly predominated over politics in the creation of the Enacted Plan and C.D.3, then the Plaintiffs should have been able to produce an alternative plan that remedied the alleged racial gerrymandering without disturbing the political viability of incumbents or the partisan ratio in Virginia's Congressional Delegation. Instead, the Plaintiff's Alternative Plan would have a significant effect on both the racial demographics and the political environments of Congressional Districts 2 and 3. The Alternative Plan itself, I think, actually provides strong and persuasive evidence that protection of incumbents, not race, was the predominant factor in the redistricting reflected in the Enacted Plan. Apart from that, the Alternate Plan also fails to show that "the legislature could have achieved its . . . political objectives in alternative ways that are comparably consistent with traditional redistricting principles." *Easley*, 532 U.S. at 258.

The majority acknowledges "that parties attacking redistricting boundaries must show 'that the legislature could have achieved its legitimate political objectives in alternate ways that are comparably consistent with traditional redistricting principles.'"

(citing *Cromartie II*, 532 U.S. at 258). Then, it says that the attacking party is not confined in its form of proof to submitting an alternative plan. I do not quarrel with that statement as a general proposition, but it is difficult to envision what other form of proof could effectively establish that element of a plaintiffs' racial gerrymandering claim where, as here, the Plaintiffs' expert acknowledges, and the evidence shows, that protection of incumbents was, at least, an important goal of the redistricting.

However, that is of no moment here because the Plaintiffs, in fact, offered in evidence the Alternative Plan in an effort to meet their burden to show "that the legislature could have achieved its . . . political objectives in alternate ways that are consistent with traditional redistricting principles." Having done so, they cannot be excused from the probative consequences of their own evidence merely because other forms of proof conceptually might have been available.

The majority is correct that the Alternative Plan provides a slight improvement in splits and that its splits affect fewer people, but that is accomplished at the expense of protecting incumbents. When all is said, I submit that the Alternative Plan shows that this case is about politics, not race, for it seeks to accomplish here a more favorable result for Democrats than does the Enacted Plan that was created through the legislative process.

I. Any Analogy To *Shaw v. Hunt* Is Inapt

It is suggested that this case is analogous to *Shaw II*, in which the Supreme Court applied strict scrutiny to North Carolina's creation of two majority-

minority districts. I find this analogy inapt for several reasons.

First, North Carolina's District 12 was not merely the least compact district in the state, but "[had] been dubbed the least geographically compact district in the nation." *Shaw II*, 517 U.S. at 906. An earlier Supreme Court opinion had described the district in almost surrealist terms:

> Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'"

Shaw v. Reno (*Shaw I*), 509 U.S. 630, 636 (1993) (internal citations omitted). While C.D.3 could hardly be described as comely, there is no evidence that its irregularities are an outlier of the sort at issue in *Shaw II*.

Second, the record in *Shaw II* included explicit and repeated admissions that race was the predominant factor in the redistricting plan. North Carolina's preclearance submission had "expressly acknowledged that [the redistricting plan's] overriding purpose was to comply with the dictates of the Attorney General's December 18, 1991 letter and [thereby] to create two congressional districts with

effective black voting majorities." *Shaw II*, 517 U.S. at 906 (quoting from district court record). Perhaps more importantly, in *Shaw II*, the defendants formally conceded to the district court "that the state legislature deliberately created the two districts in a way to assure black-voter majorities." *Id.*, (quoting *Shaw v. Barr*, 808 F. Supp. 461, 470 (E.D.N.C. 1992)). There is no such concession in this case,[46] and no explicit admission of predominant racial purpose was made in Virginia's Section 5 preclearance submission.

Third, in *Shaw II* the above indicators of racial predominance were "confirmed" by the testimony of "the redistricting plan's principal draftsman, who testified that creating two majority-black districts was the 'principal reason' for Districts 1 and 12." *Id.*, (quoting from district court record). In this case, the principal draftsman, Delegate Janis, did not testify, so the Court and the parties must determine Delegate Janis's intent from what he said during the redistricting process. And, as explained in Section II.B, Janis's statements in the floor debates do not, in my view, show that race predominated here. Furthermore, because the Enacted Plan maintains rather than creates a majority-minority district, the race-neutral factors of incumbent protection and core preservation deserve much more weight in the analysis here, than would the comments made in *Shaw II*. In the end, however, it is far from clear that the *Shaw II* Court would have found that race was the predominant factor in the absence of strong corroborating evidence in the *Shaw II* draftsman's comments. And, as explained above, I do not believe

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[46] As explained previously, I conclude that no such concession was made here.

that this record presents corroborative evidence that race predominated over politics (and particularly political incumbency protection).

III.

With respect for the views of my good colleagues in the majority, I think that the record in this case, considered as a whole, shows that the Virginia General Assembly set out to redraw district lines to protect incumbents and, in so doing, it also sought to respect traditional redistricting principles. The legislature was also fully aware of its obligation to comply with federal law and thus, of necessity, it considered race in trying to assure that compliance. But, at all times and in all the decisions it made, the predominant factors in the General Assembly's redistricting decision were the protection of incumbents and the use of traditional redistricting principles, not race.

For the reasons outlined above, I would find that race was not the predominant factor in the drawing of C.D.3. And, for the same reasons, I cannot conclude that the Plaintiffs have met their burden to prove that race was the predominant factor in this redistricting. Therefore, I would enter judgment in favor of the Defendants and dismiss the action with prejudice.[47]

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[47] Given that, under the majority opinion, the Virginia General Assembly must develop a new plan, I share the view that September 1, 2015 is the appropriate date for completion of that task. The Intervenor-Defendants' suggestion that we delay that task pending appeal is, in my view, a premature suggestion for a stay pending appeal. If there is an appeal, a motion for stay can be filed and the applicable law respecting stays can be applied after both sides are heard from.

/s/
Robert E. Payne
Senior United States
District Judge

Richmond, Virginia
Date: June 5, 2015

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAWN PAGE, *et al.* ,

Plaintiffs,

v. Civil Action No. 3:13cv678

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. That the Commonwealth of Virginia is hereby enjoined from conducting any elections for the office of United States Representative until a new redistricting plan is adopted; and

2. That the matter of providing a redistricting plan to remedy the constitutional violations found in this case is referred to the Virginia General Assembly for exercise of its primary jurisdiction. The Virginia General Assembly should exercise this jurisdiction as expeditiously as possible, but no later than September 1, 2015, by adopting a new redistricting plan.

It is so ORDERED.

/s/
Allyson K. Duncan
United States Circuit
Judge

Richmond, Virginia
Date: June 5, 2015

APPENDIX C

Amendment XIV of U.S. Constitution

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX D

52 U.S.C. § 10304. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the

United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day

period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

(Pub. L. 89-110, title I, §5, Aug. 6, 1965, 79 Stat. 439; renumbered title I and amended Pub. L. 91-285, §§2, 5, June 22, 1970, 84 Stat. 314, 315; Pub. L. 94-73, title II, §§204, 206, title IV, §405, Aug. 6, 1975, 89 Stat. 402, 404; Pub. L. 109-246, §5, July 27, 2006, 120 Stat. 580.)

CODIFICATION

Section was formerly classified to section 1973c of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section. Some section numbers referenced in amendment notes below reflect the classification of

such sections prior to their editorial reclassification to this title.

AMENDMENTS

2006—Pub. L. 109-246 designated existing provisions as subsec. (a), substituted "neither has the purpose nor will have the effect" for "does not have the purpose and will not have the effect", and added subsecs. (b) to (d).

1975—Pub. L. 94-73 inserted "or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972," after 1968, substituted "or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object," for "except that neither the Attorney General's failure to object", and "on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title" for "on account of race or color", and inserted provisions that in the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to examine the submission if additional information comes to his attention during the

remainder of the sixty-day period which would otherwise require objection in accordance with this section.

1970—Pub. L. 91-285 inserted· "based upon determinations made under the first sentence of section 1973b(b) of this title" after "section 1973b(a) of this title" and "or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968," after "1964,".

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DAWN CURRY PAGE, *et al.*,

Plaintiffs,

vs.

Civil Action No. 3:13-cv-678

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

INTERVENOR-DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that Intervenor-Defendants Robert J. Wittman, Bob Goodlatte, Randy J. Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf appeal to the Supreme Court of the United States from Memorandum Opinion (DE 170) and Order (DE 171) entered in this case on June 5, 2015.

This appeal is taken under 28 U.S.C. § 1253.

No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

APPELLANTS' REPLY BRIEF REGARDING STANDING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

APPELLANTS' REPLY BRIEF REGARDING STANDING 1

I. APPELLANTS HAVE STANDING 2

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) ..... *passim*

Clinton v. City of New York,
524 U.S. 417 (1998) 6, 7

Davis v. FEC,
554 U.S. 724 (2008) 8

Diamond v. Charles,
476 U.S. 54 (1986) 2, 7

Kirkpatrick v. Preisler,
390 U.S. 939 (1968) 9

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 8

Meese v. Keene,
481 U.S. 465 (1987) 1, 2, 8

Sanks v. Georgia,
401 U.S. 144 (1971) 10

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014) 6, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Swann v. Adams,
385 U.S. 440 (1967) 1, 2

United States v. Hays,
515 U.S. 737 (1995) 4, 5

United States v. SCRAP,
412 U.S. 669 (1973) 7

Vieth v. Jubelirer,
541 U.S. 267 (2004) 8

Whitcomb v. Chavis,
396 U.S. 1064 (1970) 9

White v. Weiser,
412 U.S. 783 (1973) 9

STATUTES

28 U.S.C. § 1253 9

Va. Stat. § 24.2-515 10

Va. Stat. § 24.2-521 10

Va. Stat. § 24.2-522 10

OTHER AUTHORITIES

Sup. Ct. R. 18 9

APPELLANTS' REPLY BRIEF REGARDING STANDING

Plaintiffs' and Defendants' briefs resoundingly confirm that Appellants face "direct injury" from the three-judge court's judgment and, thus, have standing to appeal. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618, 624 (1989). Plaintiffs and Defendants do not dispute that any remedy necessarily requires altering at least one Republican district where an Appellant has voted and been elected. *See* Pl. Br. 7-15; Def. Br. 8-9. Thus, under the undisputed facts, Appellants clearly have standing to appeal because the judgment mandates a remedy that will directly affect at least one Appellant's "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474 (1987), and interests as a Republican voter, *Swann v. Adams*, 385 U.S. 440 (1967); *see* App. Br. 1-2, 7-15.

Plaintiffs nonetheless argue that Appellants lack standing because (1) any injury to Appellants' clear interest in maintaining the existing districts is not "cognizable" because Appellants have no "legal right" to those districts, and (2) the injury will not be sufficiently certain until the lower court enters a remedy (within the next few weeks) detailing the *extent* of the injury. The first argument fundamentally confuses what *plaintiffs* must show in district court to challenge a *law* and the injury *defendants* must show on appeal to challenge a *judgment* invalidating a law, and would create a rule denying appellate standing to virtually *every* defendant. The second argument seeks to impermissibly convert the requirement that appellants show an "immediate threat" of direct injury into a rule requiring that appellants await

subsequent orders to *confirm* the precise *scope* of the injury. Moreover, awaiting entry of a remedial order before reviewing liability here would create massive confusion for Virginia voters in the 2016 elections and/or effectively deny Appellants timely relief.

I. APPELLANTS HAVE STANDING

Appellants have standing to appeal because the "judgment" causes them "direct, specific, and concrete injury" redressable by appellate reversal. *ASARCO*, 490 U.S. at 623-24. Plaintiffs and Defendants do not dispute that the three-judge court's finding of a *Shaw* violation requires a remedy that swaps black (and largely Democratic) voters from District 3 with non-black (far less Democratic) voters from one or more of the four adjacent districts, *all* of which are represented by a Republican Appellant. Pl. Br. 8-15; Def. Br. 8-9. This harm to at least one Appellant's "chances for reelection," *Keene*, 481 U.S. at 474, and voting strength as a Republican voter, *Swann*, 385 U.S. at 443, provides "a direct stake in the outcome" and, therefore, standing to appeal, *Diamond v. Charles*, 476 U.S. 54, 66 (1986); App. Br. 7-15.

Plaintiffs, however, ask the Court to dismiss this appeal and to delay its review on liability until an appeal from the remedial order, which Plaintiffs expect to issue within the next few weeks. *See* Pl. Br. 14-15. Yet such a delay would be both pointless—because Appellants' clearly have standing to appeal now—and positively harmful, because it will create enormous confusion for Virginia's voters, candidates, and election officials in the fast-approaching 2016 elections, as well as effectively deny Appellants timely relief from the erroneous judgment below.

1. Plaintiffs assert that a defendant's standing to appeal, like a plaintiff's standing to challenge a law in district court, turns on whether the judgment violates the appellant's "constitutional or statutory" "*rights*." Pl. Br. 15. But, of course, *defendants* never assert a violation of *rights* (except as a counterclaim) when they are sued. Rather, a defendant's "legally cognizable interest" on appeal is not that the challenged *law* violated its rights, but that the *judgment* erroneously deprives it of the benefits of the law it is *defending*. Thus, the *ASARCO* intervenors had a "legally protectable interest" in preserving the leases threatened by the holding that they should have been granted pursuant to competitive bidding, even though the intervenors did not assert any legal *right* to receive the leases without such bidding. 490 U.S. at 618. Indeed, defendants rarely if ever argue that the judicial remedy violates their legal rights; they assert only that the order threatens that which they possessed prior to the judgment being appealed—*e.g.*, money, unthreatened leases or, here, the districts which they helped draw to maximize their chances for reelection. Thus, Plaintiffs' radical "legal right" theory would deny virtually all defendants standing to appeal.[1]

---

[1] This fundamental difference between defendants' "interests" and plaintiffs' "rights" forecloses Plaintiffs' "absurd" notion that recognizing the "interest" Appellants have in maintaining their existing districts would somehow create a constitutional "right" in all "members of Congress" to preserve their districts. Pl. Br. 12. To use Plaintiffs' example, recognizing that incumbent members would be directly affected by a remedy which removes supportive "university communities" from their districts in no way depends upon, or suggests, a "right" to have those commu-

For the same reason, there is nothing to Plaintiffs' specific argument that defendants appealing a *judgment* finding a *Shaw* violation must establish the same injury as plaintiffs claiming that a *law* violates *Shaw*; *i.e.*, that they must reside in the allegedly gerrymandered district. Pl. Br. 8-10. As even Defendants note, this argument "conflate[s] what is needed to establish standing to assert a [*Shaw*] claim with what an appellant must show to have standing to challenge a judgment on appeal." Def. Br. 7.

United States v. Hays, 515 U.S. 737 (1995) (Pl. Br. 8), held that voters outside the gerrymandered district did "not allege a *cognizable* injury *under the Fourteenth Amendment*" because that Amendment only grants a "*personal*" right to "equal treatment" and the voters had not "suffered such [race-based] treatment." *Id.* at 746-47 (emphases added). Thus, *Hays* merely reaffirms the obvious proposition that those who have not been discriminated against have not suffered a Fourteenth Amendment injury, even if the "racial composition" of their district was affected by discrimination against *others*, just as non-minorities suffer no such injury when employment discrimination against minorities affects the composition of their workforce. *Id.* at 746 ("We have never held that the racial composition of a . . . voting district, without more, can violate the Constitution.").

Thus, *Hays* provides no support for Plaintiffs' baseless assertion that voters or representatives outside the gerrymandered district will not be "affected" or "injured" by altering the district. To the

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nities in one's district. *Id.*

contrary, *Hays* noted that creating the gerrymandered district "of course" "*affects*" the "racial composition" of adjacent districts, but this did not violate the Fourteenth Amendment because any such effect was not motivated by a racial purpose. *Id.* at 746 (no "evidence that the Legislature intended [adjacent] District 5 to have any particular racial composition"). Here, in contrast, that negative effect, even though not racially motivated, provides standing because it produces the requisite "direct stake in the outcome" of the appeal. App. Br. 6-15.

Indeed, Plaintiffs' invented rule makes no sense because representatives and voters in adjacent districts are necessarily affected to the same extent as representatives and voters in the gerrymandered district because any remedial alteration of the population in District 3 will be precisely *equal* to the (cumulative) population alteration of the adjacent district(s). For example, Plaintiffs' Alternative Plan would simply swap 172,778 people between Districts 2 and 3, Int.-Def. Ex. 23, so it would be absurd to conclude, as Plaintiffs urge, that District 3's incumbent has standing to appeal but District 2's incumbent does not, Pl. Br. 8-10. Thus, *Hays* directly *supports* Appellants' standing, particularly because the effect on the adjacent district(s) is equivalent to the effect on District 3, where voters and representatives concededly have standing.

2. Plaintiffs also contend that Appellants' injury "is too speculative to meet Article III's standing requirements" until the three-judge court enters a remedy. Pl. Br. 10. Plaintiffs argue that, even though *any* remedy will alter at least one of Appellants' districts, standing arises only after a

remedial plan is entered and makes "clear" the *extent* of injury—*i.e.*, whether the alteration to districts is "relatively small" or "substantial enough" to likely cause Appellants to "los[e] a bid for re-election." *Id.* 13.[2] But appellants are not required to show that the decision will, at the conclusion of all judicial proceedings, wholly deprive them of what they enjoyed before the judgment. They are only required to show that the adverse decision creates an "immediate threat" to the pre-judgment status quo. *ASARCO*, 490 U.S. at 618; *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334; 2342 (2014) ("credible threat of prosecution").

Again, a defendant appealing a judgment "setting aside a verdict for the defendant" is not *definitively subjected* to a pro-plaintiff verdict on remand and the *extent* of plaintiffs' victory is not knowable at the time of the appeal. *Clinton v. City of New York*, 524 U.S. 417, 430 (1998). Nevertheless, it is axiomatic that such a defendant may appeal *before* the lower court takes further action on remand. *Id.* That is because defendants suffer cognizable injury from a judgment that puts them in a worse position; *i.e.*, being *exposed* to a *potential* adverse verdict after they had been immunized from such exposure. *See id.* There is no requirement that the judgment adversely affect the

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[2] Plaintiffs also repeat their argument that standing to appeal arises only when a judgment orders the appellant "to do or refrain from" some action. Pl. Br. 10. As explained, this argument is meritless. *See* App. Br. 14. Plaintiffs, moreover, do not consistently embrace it: Plaintiffs concede that Appellants "may" have standing to appeal the remedy, but any remedy would not require them "to do or refrain from" any action. Pl. Br. 10, 14.

appellant to the *maximum* extent possible: the appellants in *Clinton* had standing prior to determining whether HHS would grant them the waiver *guaranteed* by the vetoed legislation, and the petitioners in *ASARCO* had standing prior to determining whether the remedy would deprive them of the leases. *Id.*; *ASARCO*, 490 U.S. at 618. Thus, here, since the decision below necessarily alters the pre-decision status quo (with at least the potential for re-election harm), Appellants have standing to appeal, regardless of whether subsequent judicial proceedings subject them to the worst possible injury.

Moreover, the *extent* to which the alteration of Appellants' districts hinders their re-election chances is irrelevant, so it is immaterial whether the remedial order's changes to the district are what Plaintiffs deem "relatively small." First, even a "small" injury supplies standing. *Diamond*, 476 U.S. at 67. This is particularly true in the electoral context, where the Court has found standing over what might otherwise seem to be a "trifle," such as a "fraction of a vote" or a "$1.50 poll tax." *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973).

Moreover, Plaintiffs' proposed rule that standing is available only if the district has been altered "substantially enough that the reduction is likely to harm the representative's current chances at re-election," Pl. Br. 13, is not only contrary to precedent, but also entirely unworkable and counter-productive. Apparently, Plaintiffs contemplate some sort of mini-trial or evidentiary showing, even after a remedial order has been entered, where the Court makes a *de novo* district-specific prediction about each representative's chances for re-election and then

determines whether the diminution is sufficient "enough" to constitute injury. Only then would appellants have standing to appeal. But political prognostication is both notoriously imprecise and beyond the judicial ken and, in any event, Plaintiffs' "enough" standard cannot be reduced to a "judicially manageable standard." *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 281-82 (2004) (plurality op.). Presumably that is why the Court has never hinted at such an inquiry when it has found standing to appeal in other contexts which have far less direct effect on re-election prospects than that present here. *Keene*, 481 U.S. at 474; *Davis v. FEC*, 554 U.S. 724 (2008).

Anyway, as a factual matter, the undisputed record here plainly establishes sufficient harm to re-election chances under any rational standard. *See* App. Br. 12-13. As Plaintiffs note, even Appellants' own proposed remedies, which, needless to say, minimized the harm to the extent feasible, result in a 0.6% increase in Democratic vote share in *evenly-divided* District 2. Pl. Br. 11. This converts District 2 into a majority-Democratic district and has a tangible negative effect in a previous toss-up district that has repeatedly changed hands in recent history. *See* App. Br. 6-15. All other plans have a far larger negative effect on Appellants and, of course, Plaintiffs did not bring this suit to achieve *de minimis* alteration of District 3. Finally, Appellants' merits contention (which must be taken as true for standing purposes, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) is that the Enacted Plan maximizes Appellants' re-election prospects to the greatest extent feasible, thus rendering *any* alteration injurious to those prospects. J.S. 17-21, 35.

3. Finally, Plaintiffs' request to delay this Court's review for a remedial order is a transparent effort to deny meaningful review. Plaintiffs nowhere disclose the consequences of their request. The reason is plain: Plaintiffs' delay would allow two lower-court judges to impose a pro-Democratic remedial plan for the 2016 Virginia elections *before* Appellants could obtain review of their erroneous liability decision. Such an outcome would directly contravene Congress' directive that this Court's review is so crucial in redistricting cases that it must be made available to "any party" on direct appeal of a three-judge court's "order granting or denying" an injunction, even before a remedial plan is entered. 28 U.S.C. § 1253.

Plaintiffs and Defendants have informed the three-judge court that it must enter a remedy "at the earliest practicable opportunity after November 17, 2015," and no later than January 1, to avoid disruption to the 2016 election cycle. Order (DE 241); Def. Br. 4. But regardless of the precise timing, awaiting a remedy would delay this Court's review until after the 2016 elections. Even if a remedy issues in late November, jurisdictional briefing and the Court's order noting probable jurisdiction could be completed no earlier than February 2016, and would likely stretch even later. *See* Sup. Ct. R. 18. The Court would therefore not hold oral argument until the October 2016 term.

Two scenarios therefore are possible if the Court waits for a remedy to review liability. In the first, the Court could (and should) stay the remedy pending its review of liability. *See White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (Mem.); *Whitcomb v. Chavis*, 396 U.S.

1064 (1970) (Mem.). But such a stay would unleash havoc: Virginia's 2016 election cycle would have already travelled a long way under the remedial plan, only to be shifted back mid-cycle to the different districts in the Legislature's Enacted Plan. The Court's stay would come after the January 2 commencement of the candidate signature collection period, and perhaps after the March 31 candidate qualifying deadline. Va. Stat. §§ 24.2-521; 24.2-522; 24-2.515. All administrative efforts would be wasted, candidate signatures and qualifications could be invalidated, and voters would be needlessly confused by such mid-cycle reshuffling of districts.

The second scenario—the Court denying a stay—is even worse. The 2016 election would proceed under a remedial plan whose liability underpinnings raise "substantial questions" that this Court would have concluded warrant its "plenary consideration." *Sanks v. Georgia*, 401 U.S. 144, 145 (1971). The Court thus might well *reverse* the liability decision underlying the remedial plan *after* the plan had been used in the 2016 elections. The irreparable injury to Appellants is self-evident, particularly because at least one Appellant would be compelled to seek and risk losing reelection in a majority-Democratic remedial district. *See* App. Br. 6-15. In similar circumstances, the Court has allowed pre-enforcement challenges precisely to avoid requiring parties to risk irreparable harm as the price of securing the Court's review. *See Susan B. Anthony List*, 134 S. Ct. 2334.

CONCLUSION

Appellants have standing to appeal.

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October 20, 2015

No. 14-1504

In The Supreme Court of the United States

ROBERT J. WITTMAN, *et al.*,

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GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

REPLY OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES TO SUPPLEMENTAL BRIEFING ON STANDING

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

GLOSSARY iii

INTRODUCTION 1

ARGUMENT 2

Representative Rigell has adequately alleged appellate standing, but the Court should summarily affirm 2

CONCLUSION 10

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REPLY OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES TO SUPPLEMENTAL BRIEFING ON STANDING

INTRODUCTION

The Virginia State Board of Elections appellees said in their supplemental brief that, although one or more of the Congressmen might be able to demonstrate appellate standing, none had yet articulated an injury in fact sufficient to satisfy Article III. The question here is a close one. But having reviewed Appellants' supplemental brief, we believe that Representative Scott Rigell (R-CD2) has now sufficiently alleged an injury in fact that would be redressed by the relief sought, and, consequently, that he has appellate standing. For the reasons stated in our

previous motion, however, the Court should summarily affirm the judgment of the district court.

ARGUMENT

Representative Rigell has adequately alleged appellate standing, but the Court should summarily affirm.

We disagree with Appellants that *any* marginal change in the partisan vote share of an adjoining district, no matter how small, causes an injury in fact to the adjoining-district officeholder. No precedent supports that argument. It also conflicts with the law in *United States v. Hays* and *Sinkfield v. Kelley*, that even though an adjoining district is "necessarily influenced" by the shape of a racially gerrymandered district, that fact alone does not confer standing on voters in the adjoining district.[1] Those cases likewise bar Appellants' claim of standing based on their status as "Republican voters" in the four districts adjoining CD3.[2]

But we agree with Appellants that *Meese v. Keene*[3] supports Representative Rigell's standing here. *Meese* held that the State senator there had

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[1] *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam); *United States v. Hays*, 515 U.S. 737, 746 (1995).

[2] Appellants' Suppl. Br. at 13.

[3] 481 U.S. 465 (1987).

standing to challenge a federal statute based on his claim that complying with the law, which branded the films he wished to show as "political propaganda," would "substantially harm his chances for reelection."[4] The lower court found that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and *his ability to obtain re-election* and to practice his profession would be impaired."[5] The legislator based that claim on an opinion poll and on the affidavit of an expert.[6]

In their supplemental brief, the Congressmen point out that *all* of the "properly filed proposed remedial plans make at least one Republican district represented by an Appellant majority-Democratic."[7] Importantly, of all the parties and non-parties to submit remedial plans, the Congressmen had the greatest incentive to preserve the Republican-voting performance in their own districts. Yet even their own proposed remedial plans would "increase District 2's Democratic vote share from 49.3% to 50.2%."[8] The Congressmen claim (among other things) that even that plan would materially injure Representative Rigell's chances for reelection in that "closely divided

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[4] *Id.* at 474.

[5] *Id.* at 473 (quoting *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983)) (emphasis added).

[6] *Id.* at 473-74.

[7] Appellants' Suppl. Br. at 6.

[8] *Id.*

district."[9] The Congressmen add that the other plans submitted to date "are equally bad or worse, redrawing at least one Appellant's district—and often several Appellants' districts—into majority-Democratic districts and, in some instances, pairing two or more Appellants in the same district."[10]

The evidence adduced at trial, including testimony about an alternative plan proposed by Plaintiffs, supports Representative Rigell's claim that the remedy in this case may "substantially harm his chances for reelection."[11] Although Plaintiffs have now proposed a different remedial plan, the trial testimony about their original plan is relevant because their new plan would increase the Democratic performance in CD2 nearly as much. The alternative plan they first proposed would have shifted voters from CD3 into CD2, increasing the Democratic vote share in CD2 by more than 5%, as shown in Table 1.

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[9] *Id.* at 2; *see also id.* at 10 ("Plaintiffs' Alternative Plan, which will at least be a starting point for any remedy, harms Appellant Rigell by turning toss-up District 2 into a 'heavily Democratic' district.").

[10] *Id.* at 10.

[11] *Meese*, 481 U.S. at 474.

Table 1

Democratic vote share in CD2 (based on 2008 Presidential Election)[12]	
Enacted Plan	49.5%
Plaintiffs' Alternative Plan (as offered at trial)	54.9%
Plaintiffs' Remedial Plan (currently pending)	54.8%
Congressmen's Remedial Plans	50.2%

The trial testimony established that that plan would materially and adversely affect Representative Rigell's reelection chances. Plaintiffs' own expert, Michael McDonald, testified that CD2 was a "toss-up district" that had "moved back and forth between the parties over the last decade."[13] He agreed that Plaintiffs' alternative plan could make it "more politically difficult" for Rigell to be reelected.[14] He testified that the change could "[p]otentially" have "a very negative effect" on Rigell's "future reelection prospects," though Rigell might "still win in that district because of incumbency advantages and other things."[15] Although

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[12] IX 22; Tr. 303:22-305:10; Intervenor-Defs.' Br. in Supp. of Their Proposed Remedial Plans, Exs. I, S, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 18, 2015), ECF Nos. 232-9, 232-19; Appellants' Suppl. Br. at 6.

[13] Tr. 119:10-14.

[14] Tr. 152:8-11.

[15] Tr. 181:17-25.

the majority of the district court rejected the credibility of the Congressmen's expert, John Morgan,[16] Morgan agreed with McDonald's characterization of CD2 as a "toss-up district."[17] He added that a 55%-Democratic-performing district is "highly or safely Democratic," a threshold effectively met by Plaintiffs' alternative plan.[18]

Plaintiffs have now substituted a new remedial plan for the one offered at trial, but as shown in Table 1, their new plan would increase the Democratic performance in CD2 to about the same level, 54.8%, while increasing the Democratic performance in CD4 (Representative Forbes's district) to 52.2%.[19] More importantly, even the Congressmen's proposed remedial plans—plans that are presumptively the *most favorable* to their partisan interests—increase the Democratic performance in Rigell's CD2 from 49.5% to 50.2%, making it a majority-Democratic district.

The standard of substantial-harm-to-reelection chances, set forth in *Meese*, is satisfied here by: (1) the trial testimony that CD2 is a toss-up district; (2) Representative Rigell's claim that he "intend[s] to seek reelection in 2016";[20] and (3) the fact that the remedial plans that are presumptively least

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[16] JS 21a-22a n.16.

[17] Tr. 258:17.

[18] Tr. 304:5-305:7.

[19] Appellants' Suppl. Br. at 6.

[20] *Id.* at 4.

politically injurious to Appellants—the ones they themselves have submitted—nonetheless adversely affect Rigell's reelection chances.[21]

The issue here is a close one. The district court might not alter CD2 in a manner that adversely affects Representative Rigell's reelection chances. And even if the remedial plan increases the Democratic voting performance in CD2, Rigell's incumbency advantage may still enable him to be reelected.[22] But Rigell's claims, tied with the evidence at trial that CD2 is a toss-up district, suffice to show that even the most favorable remedial plan from Appellants' joint perspective nonetheless could have "a seriously adverse effect" on Rigell's chances for reelection.[23] Like the State senator in *Meese*, Rigell "is not merely an undifferentiated bystander with claims indistinguishable from those of the general public."[24] He has alleged a sufficient injury in fact, an injury that would be redressed if he succeeded in his appeal. And "because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy

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[21] *Id.* at 2, 10.

[22] Rigell won 58.7% of the vote against a Democratic challenger in the 2014 congressional election. *See* Va. Dep't of Elections, 2014 U.S. House General Election, District 2, http://historical.elections.virginia.gov/elections/view/44424/.

[23] *Meese*, 481 U.S. at 473 n.7.

[24] *Id.* at 476.

requirement," the Court need not evaluate the standing of the other Congressmen.[25]

Nonetheless, for the reasons set forth in our previous motion, the Court should summarily affirm. The Congressmen continue to ignore the fundamental tenet of appellate review that the facts must be viewed "in the light most favorable" to Plaintiffs, who prevailed below.[26] The Congressmen insist, as they did unsuccessfully at trial, that the General Assembly intended to enshrine an "8-3 pro-Republican partisan split" when it drew the enacted plan.[27] But they forget that the district court specifically rejected that claim, finding that it was "not supported by the record."[28] Moreover, the district court's finding that CD3 was racially gerrymandered was supported by substantial evidence that the legislature used a 55%-BVAP floor

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[25] *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). We agree with Appellants, however, that to the extent the remedial plan adopted turns one of Appellants' districts into a majority-Democratic district, or forces two Appellants to compete against one another in the same district, those adversely affected Congressmen would have appellate standing under *Meese*, even if the district court left the political composition of CD2 unaltered.

[26] *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993).

[27] Appellants' Suppl. Br. at 6; *see also id.* at 4a ("Plaintiffs' plan seeks to override the Legislature's 'inarguabl[e]' political and incumbency-protection goal of maintaining the 8-3 pro-Republican split. . . .").

[28] JS 16a n.12; *see* Mot. to Affirm by Va. State Bd. of Elections Appellees at 30-32.

without regard to whether it was necessary to protect minority voting rights.[29] Given that finding, the court properly concluded that CD3 was unconstitutional under *Alabama Legislative Black Caucus v. Alabama*.[30]

Because the district court's factual findings were not clearly erroneous,[31] the judgment should be summarily affirmed.

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[29] *See* Mot. to Affirm by Va. State Bd. of Elections Appellees at 2-3, 23-29.

[30] 135 S. Ct. 1257 (2015); *see* JS 39a-40a.

[31] *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (discussing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)); Mot. to Affirm by Va. State Bd. of Elections Appellees at 23-24.

CONCLUSION

Representative Rigell has adequately alleged appellate standing, but the Court should summarily affirm the judgment below.

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GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. ARGUMENT	1
II. CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page(s)
Allen v. Wright, 468 U.S. 737 (1984)	8
ASARCO Inc. v. Kadish, 490 U.S. 605 (1989)	2, 3, 4
Baker v. Carr, 369 U.S. 186 (1962)	8
Bond v. United States, 131 S. Ct. 2355 (2011)	6
Clapper v. Amnesty Intern. USA, 133 S. Ct. 1138 (2013)	1
Clinton v. City of New York, 524 U.S. 417 (1998)	7, 8
Davis v. FEC, 554 U.S. 724 (2008)	1, 7
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	4
FEC v. Atkins, 524 U.S. 11 (1998)	9
Lexmark Intern., Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014)	8
Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992)	1, 3
Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803)	10
Meese v. Keene, 481 U.S. 465 (1987)	5, 6

TABLE OF AUTHORITIES—Continued

Page(s)

Park v. Forest Serv. of the United States, 205 F.3d 1034 (8th Cir. 2000) 1

Perry v. Vill. of Arlington Heights, 186 F.3d 826 (7th Cir. 1999) 1

Raines v. Byrd, 521 U.S. 811 (1997) 10

Reynolds v. Sims, 377 U.S. 533 (1964) 8

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 4

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 8

Swann v. Adams, 385 U.S. 440 (1967) 8, 9

United States v. Richardson, 418 U.S. 166 (1974) 10

CONSTITUTION

U.S. Const. amend. I 5, 6, 7

U.S. Const. art. III ..... *passim*

APPELLEES PERSONHUBALLAH'S AND FARKAS'S REPLY BRIEF ON STANDING

Appellants' argument they have standing to appeal because "the judgment below inflicts 'direct injury' on at least one of them," Appellants' Brief Regarding Standing ("Appellants' Br.") 1, should be rejected for the following reasons.

I. ARGUMENT

It is well settled that standing is determined when a litigant first seeks an audience in federal court. *See, e.g., Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1157 (2013) ("[W]e assess standing as of the time a suit is filed. . . ."); *Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed."); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 n.5 (1992) ("[S]tanding is to be determined as of the commencement of suit. . . .") (plurality op.).

Focusing on that snapshot in time enforces the mandate that federal courts only review cases pursued by litigants who are likely to suffer concrete, particular, and imminent harm. Thus, "[i]t cannot be that, by . . . participating in the suit, [parties] . . . retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset." *Lujan*, 504 U.S. at 570 n.4 (plurality op.). *See also Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1037-38 (8th Cir. 2000) (finding events occurring after complaint filed not relevant to whether plaintiff had standing) (citing *Lujan*, 504 U.S. at 568); *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) ("It is not enough for [a litigant] to attempt to satisfy

the requirements of standing as the case progresses . . . . standing must be satisfied from the outset[.]").

Yet, Appellants admit that the trigger for their claimed injury was the Panel's final judgment, *see* Appellants' Br. 1, not a concrete, imminent injury cognizable at the time that they intervened. Viewed from that vantage point, as it must be, it is clear that Appellants' claimed injury was too speculative to support Article III standing and, indeed, still is.

ASARCO Inc. v. Kadish does not hold otherwise. There, standing was assessed when respondent-intervenors "[sought] entry to the federal courts *for the first time* in the lawsuit." 490 U.S. 605, 618 (1989) (emphasis added). That this was after the lower court issued its judgment was a consequence of the unusual posture of the case. The respondents had been party to a *state* court action that culminated in a state supreme court judgment. *Id.* at 610. The suit was initially brought by taxpayers and a teachers association, who could not have met Article III's requirements for standing had they filed in federal court. *Id.* at 614-15 (plurality op.). Thus, when the case arrived on the Court's doorstep via respondents' petition for certiorari, with it came a jurisdictional question "of some theoretical import, though infrequent in occurrence." *Id.* at 612. Specifically, the Court had to decide, "whether we may examine justiciability at this stage because the [state] courts heard the case and proceeded to judgment, a judgment which causes concrete injury to the parties *who seek now for the first time* to invoke the authority of the federal courts in the case." *Id.* (emphasis added).[1] In the end, the Court cabined

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[1] The Court repeatedly emphasized that the respondents had not previously been in federal court. *Id.* at 613 ("[A] judgment which causes concrete injury to the parties who seek now for the

its holding to the case's peculiar circumstances, concluding only that, "[w]hen a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue . . . [in] federal court[], we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met." *Id.* at 623-24.

By contrast, this is not a case in which review is sought of a state court judgment, nor is Appellants' jurisdictional statement their first entreaty to the federal courts. But even more fundamentally, to find that Appellants have standing based on the Panel's "'adverse' 'adjudication of legal rights,'" Appellants' Br. 8, would eviscerate the requirement that litigants show, as of their first filing in federal court, a concrete and particularized injury to a legally protected interest that is "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotations omitted).

Moreover, the *ASARCO* respondents were holders of mineral leases of state lands, the legality of which were directly at issue in the case below. 490 U.S. at 609-10. Thus, in opposition, the government did *not* argue that respondents lacked a legally cognizable injury from the outset, only that the case was not justiciable by the Court because the plaintiffs could not have filed in federal court. Indeed, the government

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first time to invoke the authority of the federal courts in the case . . ."), 618 ("[P]etitioners . . . seek entry to the federal courts for the first time. . . ."), 619 ("As the parties first invoking the authority of the federal courts. . . ."), 624 ("Because they are the parties first invoking the authority of the federal courts in this case . . . .").

affirmatively argued that the respondents were "free 'to bring a declaratory judgment action *in federal court' raising these same claims*." *Id.* at 620 (quoting Brief for United States) (emphasis added).[2]

In contrast, Appellants' specific claim to a legally cognizable injury remains strikingly vague. Remarkably, at one point they appear to assert that their injury arises because the Panel is likely to move black voters into their districts. *See* Appellants' Br. 9 (arguing the decision below "requires a remedy that will harm at least one Appellant" because "[a]ny remedy must . . . move [black] voters *out* of District 3 and into one or more of the surrounding . . . districts, and an equal number of non-black (and largely Republican) voters into District 3"). Not surprisingly, Appellants fail to cite any cases suggesting that a politician's fear that voters of a certain race may be moved into his district is a legally cognizable injury entitling him to federal court review.

One hopes that what Appellants *meant* to say was, not that they are injured when black voters are moved into their district, but rather that, if enough Democratic voters are moved into their district, they may ultimately *lose their seat* when they run for reelection. But even assuming that such an injury is theoretically cognizable, it cannot support Article III standing here because it is highly speculative. Several things must happen before it could come to pass: the Panel must approve a map that decreases the Republican vote share in at least one of Appellants' districts enough to create a meaningful threat to an

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[2] The Court rejected this argument based on the case's particular posture, finding it would force the respondents into federal district court to obtain review of a state court decision in violation of the *Rooker-Feldman* doctrine. *Id.* at 622-23.

Appellant's reelection. Then, the Appellant has to win a primary election against any challengers (Cantor faltered here in 2014). Then, the Appellant has to lose in the general election to a Democrat *and* be able to demonstrate that the loss was due, not to the independent ever-shifting nature of the electorate, or to votes by swing voters—or even to scandals of the Appellant's own making—but to the Panel's adoption of a map that swapped some Democrats for Republicans in the Appellant's district. Appellants are unlikely to *ever* be able to make that showing, but they certainly have not done so on the record here.[3]

The remaining cases that Appellants rely upon are similarly inapposite. Appellants' reliance on *Meese v. Keene*, 481 U.S. 465 (1987), for example, ignores that it was a First Amendment case, and the reputational injury that the Court found supported the appellee's standing was of a sort long recognized as legally cognizable. *See id.* at 475-76. Indeed, based on the Court's First Amendment precedent, the appellee's claim that the government's classification of films that appellee wished to disseminate as "political propaganda" would damage his reputation was likely *on its own* sufficient to confer Article III standing. Nowhere does the opinion hold that appellee's additional claim that it threatened his political career was necessary or

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[3] As Appellants appear to recognize by asserting (without record citation) that "[a]ll eight Appellants currently serving in Congress intend to seek reelection in 2016," Appellants' Br. 4, their claimed injury only materializes if they run for reelection under a yet-to-be-adopted remedial map. Thus, the Panel's decision does not endanger their seats *as currently occupied*, but rather Appellants claim it *could endanger their chances of reelection* to those seats in 2016. None of the cases cited by Appellants support their argument that this sort of highly conjectural injury is cognizable for Article III standing purposes.

central to his standing. *See id.* (discussing precedent "in which we did not question that petitioner had standing to challenge a statute requiring . . . all 'communist political propaganda' originating abroad [be held] and not release[d] . . . to the addressee unless that individual made a written request" to assert First Amendment claim). Moreover, the claimed injury to the appellee's reelection chances was part and parcel to the claimed reputational harm. *Id.* at 476 ("[E]njoining the application of the words 'political propaganda' to the films would at least partially redress the *reputational* injury of which appellee complains.") (emphasis added).[4]

Even if a First Amendment injury could confer standing to defend against a racial gerrymandering claim (and Appellants cite nothing that would support such a conclusion), Appellants do not and cannot claim that the Panel's decision causes them any reputational harm, making their reliance on *Meese* inapposite. And, even if *Meese* could be read to permit a party to proceed in any type of case based on threatened injury to a chance for re-election (which, on its face, it does not), Appellants have failed to make any evidentiary showing that they are likely to suffer such an injury in *this* case. *Cf. id.* at 473-74 (finding appellee submitted "uncontradicted" evidence law was likely to cause him

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[4] The Board of Elections reads *Bond v. United States*, 131 S. Ct. 2355 (2011), too broadly, essentially asserting that, if Appellants can cobble together *some* claimed injury, they could have standing (on the appropriate record) to defend against any challenge, both in the first instance and by seeking review of this Court. Bond was charged with a federal crime and the judgment that she sought to appeal was *her conviction of that crime*. *Id.* at 2360. She indisputably had Article III standing to avail herself of a federal judicial audience to begin with. In contrast, Appellants lacked standing from the start of this litigation.

cognizable injury, including "detailed affidavits . . . describing the results of an opinion poll and . . . containing the views of an experienced political analyst, supporting the conclusion that his exhibition of films that have been classified as 'political propaganda' . . . would substantially harm his chances for reelection and would adversely affect his reputation in the community").

Davis v. FEC, 554 U.S. 724 (2008), similarly involved a well-established First Amendment injury not shared by Appellants. There, a candidate challenged the disclosure requirements for self-financing candidates imposed by federal campaign finance law. *Id.* at 730. Failure to comply could result in civil and criminal penalties. *Id.* The Court found the candidate faced a cognizable injury-in-fact "when he filed suit" and "declared his candidacy and his intent to spend more than $350,000 of personal funds in the general election campaign whose onset was rapidly approaching." *Id.* at 734. Appellants' position, at the risk of understatement, is not remotely similar.

Clinton v. City of New York also offers no support for Appellants. At issue there was the constitutionality of the Line Item Veto Act. 524 U.S. 417, 420 (1998). The appellants included state entities that, as a direct result of the exercise of the veto, owed $955 million to the United States, which "immediately and directly affect[ed] the borrowing power, financial strength, and fiscal planning" of those entities, *id.* at 422, 431, and a cooperative of farmers who similarly suffered immediate injury when a tax benefit it had concrete plans to use was vetoed. *Id.* at 432.

By contrast, Appellants' claims are ill-defined, and, worse, would require a highly-improbable chain of events. Indeed, assuming that their claim of "injury"

is cognizable under any circumstances, it is nonjusticiable for the reasons discussed in *Allen v. Wright*, 468 U.S. 737 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), in both of which the Court found the claimed injuries too attenuated to support Article III standing. *See Clinton*, 524 U.S. at 434 n.23 (discussing cases).[5]

Appellants' reliance on *Swann v. Adams* also fails. *Swann* involved a challenge to a legislative map that contained substantial district-to-district population deviations. 385 U.S. 440, 442-43 (1967). In a population deviation challenge, any voter from a district that is overpopulated and underrepresented has standing to challenge an entire districting plan. *Baker v. Carr*, 369 U.S. 186, 205-06 (1962). *See also Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("[A]n individual's right to

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[5] In *Allen*, the Court found the injury of "children's diminished ability to receive an education in a racially integrated school" could not support standing because the nexus between the challenged conduct and the injury was speculative at best, raising questions about how the policy was likely to impact behavior of schools and parents in reality, the scope of that impact, and "whether, in a particular community, a large enough number of the numerous relevant . . . officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." 468 U.S. at 756-58. In *Simon*, the respondents argued they were injured by a tax ruling that "'encouraged' hospitals to deny services to indigents." 426 U.S. at 42. The Court found this to be too speculative, explaining: "[I]t does not follow . . . that the denial of access to hospital services in fact results from . . . [the] Ruling, or that a court-ordered return . . . to [the] previous policy would result in . . . respondents' receiving the hospital services they desire"; the injury may instead independently "result from decisions made . . . without regard to the tax implications." *Id.* at 42-43.

vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living [i]n other parts. . . ."). In contrast, in racial gerrymandering cases, the injury is *district*-specific, and only the voters who reside in a challenged district suffer from legally cognizable injuries, i.e., that of being unconstitutionally classified based on their race without compelling legal justification. *See* Supp. Br. for Voter Appellees on Standing 8-10.

Moreover, the *Swann* Court found that the district court had "treat[ed] the [voter] appellants as representing other citizens in the State," to include voters living within the malapportioned districts. *Id.* at 443. The Republican Members who press this appeal can make no claim that they have either sought to, or the Panel has ever treated them, as representing the interests of either CD3's voters or its representative, Democrat Bobby Scott.

Appellants' reliance on *FEC v. Atkins* is so misplaced as to be perplexing. There, the Court found certain voters had standing to obtain review of a FEC decision dismissing their complaint that AIPAC was a "political committee" and thus subject to registration and reporting requirements. 524 U.S. 11, 13-14 (1998). Appellants were "voters with views often opposed to those of AIPAC," *id.* at 15, and the Court held that, given that there was a statute that was meant "to protect individuals such as respondents from the kind of harm they say they have suffered, i.e., failing to receive particular information about campaign-related activities," *id.* at 22, the FEC's argument that the voters lacked standing was a non-starter, *see id.* at 26.

II. CONCLUSION

Appellants' argument that they, members of Congress representing districts *other than* CD3, have standing to defend this litigation, while voters outside CD3 who share their "injury" could not obtain review of the same, is fundamentally at odds with "'[t]he irreplaceable value of the power articulated . . . [in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)],'" which "'lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.'" *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (quoting *United States v. Richardson*, 418 U.S. 166 (1974) (Powell, J., concurring)). "'It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.'" *Id.*

"In . . . light of [the] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," the Court has long recognized it must "put aside the natural urge to proceed directly to the merits . . . and to 'settle' it for the sake of convenience and efficiency" and must "carefully inquire as to whether [litigants] have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.* at 820.

As discussed, Appellants do not and cannot make this showing. Appellees respectfully submit that this appeal should be dismissed for lack of jurisdiction.

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October 20, 2015

No. 14-1504

In The
Supreme Court of the United States

ROBERT J. WITTMAN, *et al.*,

Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

MOTION TO AFFIRM BY VIRGINIA STATE BOARD OF ELECTIONS APPELLEES

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the district court committed clear error in finding that race was the predominant factor in redrawing Virginia's Third Congressional District (CD3)—triggering strict scrutiny—where the evidence, viewed in the light most favorable to the plaintiffs, supported the court's conclusion that: (1) avoiding retrogression under § 5 of the Voting Rights Act was the "primary focus" and the "paramount," "nonnegotiable" concern in the redistricting; (2) the legislature increased the black voting-age population in CD3 from 53.1% to 56.3% in order to meet a mechanical threshold of 55%; (3) minority voters in CD3 already were able safely to elect their candidate of choice; and (4) the legislature performed no functional analysis to determine if increasing the black voting-age population was necessary to protect voting rights.

2. Whether the district court committed clear error in finding that the use of race was not narrowly tailored to avoid retrogression in CD3, given the absence of any functional analysis supporting the need to increase the concentration of black voters from 53.1% to 56.3%.

NOTICE OF CHANGE IN PARTY NAMES

The following appellees, defendants in the district court, were sued in their official capacities as members of the Virginia State Board of Elections:

- Charlie Judd, Chairman of the Virginia State Board of Elections;
- Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections;
- Don Palmer, Secretary of the Virginia State Board of Elections.

They no longer serve in those capacities. The current officials are:

- James B. Alcorn, Chairman of the Virginia State Board of Elections;
- Clara Belle Wheeler, Vice-Chair of the Virginia State Board of Elections; and
- Singleton B. McAllister, Secretary of the Virginia State Board of Elections.

Under Rule 35.3, appellees Alcorn, Wheeler, and McAllister are substituted for Judd, Bowers, and Palmer.

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED i

NOTICE OF CHANGE IN PARTY NAMES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

GLOSSARY viii

INTRODUCTION 2

STATEMENT OF FACTS 4

ARGUMENT 23

I. The district court did not commit clear error in finding that race was the predominant factor in redrawing CD3 24

A. Substantial evidence supported the majority's finding that race was the predominant factor and that the General Assembly used a 55%-BVAP floor 24

B. It was not clear error to reject the claim that the legislature intended to preserve an 8-3 split in Virginia's congressional delegation 30

C. Plaintiffs were not required to submit an alternative plan in order to prove that racial considerations predominated, but the plan they submitted supported that conclusion as well 35

TABLE OF CONTENTS—Continued

Page

II. The district court did not commit clear error in finding that the legislature's use of race was not narrowly tailored to protect minority voters' ability to elect their candidate of choice..... 40

CONCLUSION..... 46

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 40

Ala. Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 3, 4, 7, 9, 20, 29, 38, 39, 43

Ala. Legislative Black Caucus v. Alabama,
989 F. Supp. 2d 1227 (D. Ala. 2013),
rev'd, 135 S. Ct. 1257 (2015) 43

Anderson v. Bessemer City,
470 U.S. 564 (1985) 23, 35

Brooke Group v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 24

Bush v. Vera,
517 U.S. 952 (1996) 35, 40, 41, 42, 43

Cantor v. Personhuballah,
135 S. Ct. 1699 (2015) 20

Cosner v. Dalton,
522 F. Supp. 350 (E.D. Va. 1981) 45

Easley v. Cromartie,
532 U.S. 234 (2001) ..... *passim*

Fisher v. Univ. of Tex.,
133 S. Ct. 2411 (2013) 43, 44

Hall v. Virginia,
385 F.3d 421 (4th Cir. 2004) 6, 7

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 44

TABLE OF AUTHORITIES—Continued

Page

Miller v. Johnson,
515 U.S. 900 (1995) 5, 37, 39

Moon v. Meadows,
952 F. Supp. 1141 (E.D. Va.),
aff'd mem., 521 U.S. 1113 (1997) 4, 5, 6, 8

Page v. Va. State Bd. of Elections,
58 F. Supp. 3d 533 (E.D. Va. 2014),
vacated and remanded sub nom. Cantor v. Personhuballah, 135 S. Ct. 1699 (2015) 15, 20

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 43

Schuette v. Coal. to Defend Affirmative Action,
134 S. Ct. 1623 (2014) 39

Shaw v. Hunt,
517 U.S. 899 (1996) 40

Shaw v. Reno,
509 U.S. 630 (1993) 5, 6, 41, 42, 44

Shelby Cnty. v. Holder,
133 S. Ct. 2612 (2013) 15, 40

United States v. U.S. Gypsum Co.,
333 U.S. 364 (1948) 24

Wilkins v. West,
571 S.E.2d 100 (Va. 2002) 7

TABLE OF AUTHORITIES—Continued

Page

STATUTES

28 U.S.C. § 2284 15

Voting Rights Act of 1965,
79 Stat. 439, as amended, 52 U.S.C. § 10301
et seq. .....*passim*

LEGISLATIVE MATERIALS

Guidance Concerning Redistricting Under
Section 5 of the Voting Rights Act,
76 Fed. Reg. 7,470 (Feb. 9, 2011).....7, 8

GLOSSARY

BVAP	Black Voting-Age Population
CD#	Virginia Congressional District No.
The Congressmen	Appellants Robert J. Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf
DOJ	The U.S. Department of Justice
DX	Defendants' Trial Exhibit No.
IX	Intervenor-Defendants' Trial Exhibit No.
JS	Jurisdictional Statement
PX	Plaintiffs' Trial Exhibit No.
Tr.	Trial Transcript Page No.
VRA	Voting Rights Act of 1965, 79 Stat. 439, as amended, 52 U.S.C. § 10301 *et seq*.
VTD	Voting Tabulation District

No. 14-1504

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On Appeal From The United States District Court For The Eastern District Of Virginia

MOTION TO AFFIRM BY VIRGINIA STATE BOARD OF ELECTIONS APPELLEES

Pursuant to Rule 18.6, Appellees James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister—in their official capacities as members of the Virginia State Board of Elections—move to affirm the decision of the district court.

INTRODUCTION

Plaintiffs-Appellees, voters in Virginia's Third Congressional District (CD3),[1] sued the members of Virginia's State Board of Elections alleging that the Virginia General Assembly's 2012 congressional redistricting plan is a racial gerrymander. Virginia's eight Republican congressmen intervened in the district court to defend the plan. They or their successors are the Appellants here. The Office of the Attorney General of Virginia defended the plan alongside the Congressmen until the three-judge district court, after a full trial on the merits, declared the plan unconstitutional. The Congressmen alone have appealed.

On appeal, it is settled that the evidence must be viewed in the light most favorable to the plaintiffs, who prevailed at trial, and that the district court's factual findings can be set aside only for clear error.

Applying that standard, substantial evidence supported the district court's finding that racial considerations predominated in the redistricting. The sole author of the Enacted Plan explained that avoiding retrogression in CD3, under § 5 of the Voting Rights Act, was his "primary focus" and the "paramount" and "nonnegotiable" concern. He said that his plan satisfied § 5 by increasing the black voting-age population in CD3 from 53.1% to 56.3%. But the

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[1] A glossary of abbreviations is found *supra* at viii.

evidence was undisputed that African-American voters in CD3 were already able to safely elect their candidate of choice, and that no functional analysis was performed to show the need to increase the concentration of black voters any further. And while the parties disputed whether the legislature applied a 55%-BVAP floor of the kind rejected in *Alabama Legislative Black Caucus v. Alabama*,[2] sufficient evidence supported the trial court's finding that there was such a floor. Accordingly, the district court did not err in concluding that racial considerations predominated in the redistricting, triggering strict scrutiny.

The appellants are mistaken that the plaintiffs failed to satisfy the legal requirements of *Easley v. Cromartie*.[3] They argue that *Easley* requires proof in *every* case of an alternative plan that comports with the legislature's traditional redistricting goals while also improving racial balance. Assuming for argument's sake that such a requirement applied here, the district court did not commit clear error in concluding that the plaintiffs' alternative plan passed muster. The appellants counter that the plaintiffs' alternative plan would have jeopardized the legislature's alleged intent to cement an 8-3 split favoring the 8 Republican members of Virginia's congressional delegation. But the district court, in rejecting that theory, relied

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[2] 135 S. Ct. 1257 (2015).

[3] 532 U.S. 234 (2001).

on the sponsor's own admission disclaiming such partisan motives. Doing so was not clearly erroneous. And in any case, *Alabama* makes clear that proof of an alternative plan, like other methods needed in circumstantial-evidence cases like *Easley*, is not necessary in direct-evidence cases like this one.

Because strict scrutiny applied and because the defense expert disclaimed any opinion on the narrow-tailoring question, the district court likewise did not err in holding that the legislature's use of race was not necessary under § 5 to protect the ability of minority voters to elect their candidate of choice. Accordingly, the Court should summarily affirm.

STATEMENT OF FACTS

1. Virginia currently has eleven congressional districts.[4] CD3 is the only majority-minority district.

As originally drawn in 1991, CD3 had a black population of 63.98% and a BVAP of 61.17%.[5] The district court in *Moon v. Meadows* described how the General Assembly created CD3 as "an amalgamation principally of African-American citizens contained within the legislatively determined boundaries for the

[4] IX 2 (map).

[5] PX 50.

obvious purpose of establishing a safe black district."[6] The district was "anchored in the tidewater cities of Norfolk, Suffolk, and Portsmouth."[7] The district used "only the open water of the Chesapeake Bay and the James River to connect the disparate and non-contiguous portions" of various "areas where blacks predominate, before terminating . . . in the City of Petersburg, which it also divides racially," and extending north to the "heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a small black neighborhood in northern Henrico County."[8]

Virginia submitted its 1991 congressional redistricting plan for preclearance under § 5 of the VRA, and DOJ precleared it in February 1992.[9]

In 1997, applying this Court's decisions in *Shaw v. Reno*[10] and *Miller v. Johnson*,[11] the three-judge court in *Moon* invalidated CD3 as an unconstitutional racial gerrymander. The court said the evidence was "overwhelming that the creation of a safe black

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[6] 952 F. Supp. 1141, 1144 (E.D. Va.), *aff'd mem.*, 521 U.S. 1113 (1997).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] 509 U.S. 630 (1993) (*Shaw I*).

[11] 515 U.S. 900 (1995).

district predominated in the drawing of the boundaries."[12] It also found that the "bizarre" shape and "racial characteristics" of the district supported the conclusion that racial considerations predominated in its drawing.[13]

In response, the legislature redrew CD3 in 1998, omitting the cities of Portsmouth and Petersburg.[14] The BVAP in CD3 dropped from 61.17% in the original plan to 50.47% in the revised plan.[15] DOJ precleared that plan,[16] and it was never challenged.

In 2001, after the 2000 census, the General Assembly again redrew Virginia's congressional districts.[17] The redistricting plan shifted a number of black voters from CD4 into CD3 and CD5.[18] As a result, the BVAP in CD3 increased from 50.47%, in the 1998 plan, to 53.1% in the enacted plan.[19]

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[12] 952 F. Supp. at 1145.

[13] *Id.* at 1147 (citing *Shaw I*, 509 U.S. at 646).

[14] Tr. 48:13-15; PX 21 at 1-2 (Virginia's 1998 § 5 submission).

[15] PX 50.

[16] Tr. 48:8-12.

[17] PX 19 (Virginia's 2001 § 5 submission).

[18] *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004) (footnote omitted).

[19] PX 27 at 14. One summary exhibit referenced a "53.2%" BVAP figure in the 2001 plan, rather than 53.1%. PX 50. There were references at trial to both numbers. *Compare* Tr. 49:16, 50:17 *with* Tr. 212:16, 326:4. The district court's opinion used the 53.1% figure. JS 9a, 20a, 40a.

DOJ precleared that plan,[20] and CD3 was not challenged.[21]

2. Following the 2010 census, one-person-one-vote requirements dictated that each congressional district have a population of no less than 727,365 and no more than 727,366; CD3 was underpopulated by 63,976 citizens.[22]

On February 9, 2011, DOJ issued its Guidance on Voting Rights Act Compliance,[23] discussed by this Court in *Alabama*.[24] The Guidance clarified that fixed racial targets were not required to obtain preclearance of redistricting plans submitted by covered jurisdictions under § 5 of the VRA:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the

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[20] *Hall*, 385 F.3d at 424 n.1.

[21] A challenge was rejected to CD4 that had alleged minority-vote dilution under § 2 of the Voting Rights Act. *Id.* at 423. The opinion in *Hall* was authored by Judge Duncan, who authored the majority opinion of the three-judge court in this case. Redistricting challenges to Virginia's House and Senate districts were also rejected by the Supreme Court of Virginia in *Wilkins v. West*, 571 S.E.2d 100 (Va. 2002).

[22] PX 13 at 12:3-8; PX 27 at 14; Tr. 58:17-22, 381:23-382:2.

[23] 76 Fed. Reg. 7,470 (Feb. 9, 2011) (DX 9).

[24] 135 S. Ct. at 1272-73.

> Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.[25]

Two weeks later, the General Assembly commenced a special session dedicated to redistricting.[26] The House of Delegates was controlled by Republican members, the Senate by Democrats.[27]

On March 25, 2011, the Privileges and Elections Committee of the Virginia Senate adopted criteria to consider in drawing new congressional districts.[28] But the plan that became CD3 originated in the House of Delegates.

The sole author of what became the congressional redistricting plan was Delegate Bill Janis (R-Henrico).[29] Janis's plan increased the total black population in CD3 from 56.8% to 59.5%, and it increased the BVAP from 53.1% to 56.3%.[30] Janis's plan, among other things, returned to CD3 the City of Petersburg, which had been removed in 1998 after *Moon* invalidated the district.[31]

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[25] 76 Fed. Reg. at 7,471; *see also* Tr. 62-63.

[26] PX 8 at 5.

[27] *See* Tr. 40:10-19.

[28] PX 5.

[29] Tr. 34:6-38:6; PX 43 at 14:1-15:3.

[30] PX 27 at 14.

[31] Tr. 47:14-48:22.

Delegate Janis spoke at length about his plan on the House floor on April 12, 2011.[32] At the outset, he said that he drew his plan "based on several criteria."[33] "First, and most importantly," the districts had "to comply with the one-person-one-vote rule."[34] The "second criteri[on]" was "that the districts were drawn to conform with all mandates of federal law, and, most notably, the Voting Rights Act. The Voting Rights Act mandates that there be no retrogression in minority voter influence in the 3rd Congressional District."[35] "Third, the districts were drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections."[36] He said the districts were based "on the core of the existing congressional districts with the minimal amount of change or disruption to the current boundary lines, consistent with the need . . . to ensure that each district had the right 727,365 benchmark."[37] "Wherever possible," Janis "attempt[ed] to keep together jurisdictions and localities,

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[32] PX 43 at 2-49.

[33] *Id.* at 3:2.

[34] *Id.* at 3:3-7. *Alabama* now makes clear that "an equal population goal" is simply a "background" requirement in any congressional redistricting, not a factor to be weighed against the use of race to determine if race predominates. 135 S. Ct. at 1270.

[35] PX 43 at 3:16-22.

[36] *Id.* at 4:6-8.

[37] *Id.* at 4:9-14.

counties, cities and towns."[38] He added that his plan split "fewer jurisdictions than the current congressional district lines."[39] He said that his plan "[w]herever possible . . . seeks to preserve existing local communities of interest" and in some instances to "reunite such communities" fractured in earlier plans.[40]

Janis also said that he spoke with all of the existing congressional delegation, and that "[b]oth Republican and Democrat members provided specific detailed and significant input in recommendations to how best to draw the lines for their districts."[41] He added that "each confirmed for me and assured me that the lines for their congressional district as they appear in this legislation conform to the recommendations that they provided" and "that they support the line of their congressional district" as drawn.[42]

Although Janis's initial remarks identified nonretrogression in CD3 as the "second" criterion, his later comments in response to questions from the floor characterized nonretrogression as the single most important factor:

> And that's how the lines were drawn, and that was the *primary focus* of how the lines

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[38] *Id.* at 4:21-22.

[39] *Id.* at 5:1-2.

[40] *Id.* at 5:8-11.

[41] *Id.* at 5:16-19.

[42] *Id.* at 6:1-6.

> . . . were drawn was to ensure that there be no retrogression in the 3rd Congressional District.[43]

At other points Janis made similar comments, such as: "I was most especially focused on making sure that the 3rd Congressional District did not retrogress in its minority voting influence";[44] and nonretrogression was "one of the paramount concerns" that was "nonnegotiable."[45]

Delegate Armstrong (D-Martinsville) asked whether any functional voting analysis had been conducted to determine the percentage of minority voters needed in CD3 in order for black voters to elect a candidate of their choice.[46] Janis did not identify any.[47] Armstrong then argued against Janis's plan, explaining that it "is not enough to merely look at the minority population to determine if that is a minority majority district for voting purposes. You have to conduct the voting pattern analysis in order to determine what that percentage is."[48] "And when you don't do the regression analysis . . . you can crack and

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[43] *Id.* at 25:13-16 (emphasis added).

[44] *Id.* at 14:24-15:1.

[45] *Id.* at 25:8-10.

[46] *Id.* at 12:23-13:6.

[47] *Id.* at 13:7-14:10, 15:9-22.

[48] *Id.* at 47:4-8.

pack, the slang terms used to either put too many minorities in a district or too few."[49]

At the end of debate, the House of Delegates approved the Janis plan by a vote of 71 to 23.[50]

Later that day, the Senate Committee on Privileges and Elections took up the Janis plan and a substitute plan proposed by Senator Mamie Locke (D-Hampton). Delegate Janis repeated the opening comments he had given on the House floor in support of his plan.[51] In response to further questioning, Janis admitted that, while he had solicited each congressman's views about his own proposed district, he had not solicited an opinion "from any of them as to the entire plan in its totality . . . ."[52]

Senator Creigh Deeds (D-Charlottesville) then asked Janis, "Do you have any knowledge as to how this plan improves the partisan performance of those incumbents in their own district?"—to which Janis replied: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district."[53]

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[49] *Id.* at 47:18-22.

[50] *Id.* at 49:14-17.

[51] IX 9 at 4-9.

[52] *Id.* at 9:6-7, 13:23-14:2.

[53] *Id.* at 14:7-13.

With regard to her proposed plan, Senator Locke explained that she intended to create two majority-minority districts.[54] The Senate Committee adopted the Locke proposal and the Senate approved and transmitted it to the House.[55]

The Locke and Janis plans were then considered by the House of Delegates.[56] In the floor debates, Delegate Janis argued that his plan was certain to obtain DOJ preclearance while the Locke plan faced "uncertainty as to whether or not [it] would actually be permissible under the Voting Rights Act, particularly because it takes the 3rd Congressional District and retrogresses it" from a "56 percent minority voting district" "to a 40 percent minority voting district."[57]

The House rejected the Locke plan[58] and the House and Senate conferees were unable to resolve the deadlock.[59] The 2011 Special Session adjourned sine die.[60]

Before that session concluded, however, the legislature did reach agreement on redistricting plans

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[54] *Id.* at 18:12-18.

[55] *Id.* at 25:25-26:1; PX 8 at 8.

[56] PX 45.

[57] *Id.* at 7:13-8:20.

[58] *Id.* at 11:8-9.

[59] PX 8 at 8.

[60] *Id.*

for the Virginia House of Delegates and Senate.[61] Each of the twelve majority-minority districts in the House-of-Delegates plan had a BVAP of at least 55%.[62] In the floor debates surrounding that plan, some members spoke of the need to get "at least 55 percent performing" in majority-minority districts[63] and expressed concern that the need to comply with § 5 of the VRA "was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0."[64]

After the November 2011 elections, Republicans continued to control the House of Delegates and also obtained control of the Senate. Delegate Janis did not run for reelection but his 2011 redistricting plan was reintroduced and adopted by both the House and Senate and signed into law on January 25, 2012, by then-Governor Robert F. McDonnell.[65]

Before the final vote, Senator Locke protested on the Senate floor that CD3 "has been packed" with African Americans, protecting incumbents in the surrounding districts but leaving African Americans in the First, Second, and Third Congressional Districts

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[61] IX 13 at 26.

[62] *Id.*

[63] IX 30 at 13:23-24 (statement of Del. Dance).

[64] IX 32 at 18:12-16 (statement of Del. Vogel); *see also id.* at 20:8-11, 22:6-12.

[65] PX 8 at 8-9.

"essentially disenfranchised."[66] Senator McEachin (D-Richmond) agreed that the plan was "packing the 3rd Congressional District and deliberately denying minority voters the opportunity to influence congressional districts elsewhere."[67] He said that the plan violated the VRA because the black-voter concentration "is not necessary . . . to afford minorities the opportunity to choose a candidate of their choice."[68]

The Senate adopted the Janis plan on a vote of 20-19.[69] The DOJ precleared the plan in March 2012.[70]

On June 25, 2013, this Court, in *Shelby County v. Holder*, invalidated the coverage formula in § 4 of the VRA, under which Virginia had been a covered jurisdiction that was required to seek preclearance under § 5.[71]

3. The plaintiffs—voters residing in CD3—commenced this action in October 2013, claiming that CD3 was unconstitutional because "[r]ace was the predominant factor" in its creation and that the use of race was "not narrowly tailored to serve a compelling state interest."[72] Pursuant to 28 U.S.C. § 2284, the

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[66] PX 47 at 16:2-6.

[67] *Id.* at 23:15-18.

[68] *Id.* at 22:13-16.

[69] *Id.* at 25:16.

[70] JS 10a.

[71] 133 S. Ct. 2612, 2631 (2013).

[72] Compl. at 9, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Oct. 2, 2013), ECF No. 1; *see* JS 3a-4a.

chief judge of the Fourth Circuit designated a three-judge court, consisting of Judge Duncan, Judge Payne and Judge O'Grady.[73] Without objection, the eight Republican congressmen from Virginia intervened to defend the district as drawn—Eric Cantor (CD7), Robert J. Wittman (CD1), Bob Goodlatte (CD6), Frank Wolf (CD10), Randy J. Forbes (CD4), Morgan Griffith (CD9), Scott Rigell (CD2), and Robert Hurt (CD5).[74] The three Democratic congressmen, including Bobby Scott (CD3), did not seek intervention.

The district court denied the defendants' and the Congressmen's motions for summary judgment, finding "genuine disputes of material fact."[75] The case was then tried on May 21-22, 2014.

The record consisted of the parties' trial exhibits, admitted without objection, and the live testimony of two expert witnesses. For the plaintiffs, Michael McDonald qualified without objection as an expert in political science.[76] His expert reports were admitted into evidence[77] and he testified at length about his finding that race was the predominant factor in drawing CD3, subordinating traditional redistricting

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[73] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Oct. 21, 2013), ECF No. 10.

[74] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Dec. 3, 2013), ECF No. 26.

[75] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Jan. 27, 2014), ECF No. 50.

[76] Tr. 27:3-6.

[77] PX 26-30.

principles.[78] McDonald also testified about his analysis of an Alternative Plan[79] under which the BVAP in CD3 could have been lowered to 50.2%,[80] while improving performance with regard to traditional redistricting principles, including compactness, contiguity, and reducing splits in localities and precincts (VTDs).[81]

McDonald's cross-examination focused on the defense claim that his Alternative Plan would have increased the Democratic vote share in CD2 (Congressman Rigell's district), changing it from a "50 percent toss-up district" to a 55% Democratic district, thereby jeopardizing an 8-3 split in Virginia's congressional delegation.[82] The defendants and Congressmen also sought to show that Alternative CD3 would not have maintained the core of the district as well as Enacted CD3. Alternative CD3 would have contained only 69.2% of the population of the original district, while Enacted CD3 preserved 83.1%.[83]

The defendants and Congressmen also challenged McDonald's credibility. They pointed out that, before testifying for plaintiffs, McDonald had published a law review article noting the apparent intent

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[78] Tr. 25-239.

[79] Tr. 107-17; *see* PX 29 (analysis), 49 (maps).

[80] Tr. 157:13-18; PX 29 at 1, 8.

[81] Tr. 109-17.

[82] Tr. 184:15-19.

[83] IX 27; Tr. 422:18-21.

of the 2012 redistricting plan "to create an 8-3 Republican majority."[84] At trial, however, McDonald explained that when he wrote that article, he had not yet done the analysis needed to determine if race was the predominant factor in redrawing CD3.[85]

The defendants and Congressmen offered John Morgan as their expert witness. Morgan qualified without objection as an expert in demography and redistricting.[86] He testified that the creation of CD3 was explainable by politics and incumbency protection and did not subordinate traditional factors to race.[87] He admitted on cross-examination, however, that he had made mistakes in his quantitative analysis.[88] Although he corrected some of those errors before trial, more were brought out during cross-examination.[89] Morgan insisted that the errors did not affect his opinion that politics alone could explain the redistricting.[90]

There was conflicting evidence at trial about whether the General Assembly applied a 55%-BVAP floor or quota in establishing CD3. Morgan, who worked for Republican members of the House of

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[84] Tr. 129:3-25.

[85] Tr. 32:7-11, 226:9-21.

[86] Tr. 241:18-23.

[87] Tr. 247:2-11.

[88] Tr. 359-66.

[89] Tr. 365:3-10.

[90] Tr. 392:3-24.

Delegates in redrawing the House-of-Delegates districts in 2011,[91] opined that the General Assembly acted in accordance with a reasonable belief that a BVAP of at least 55% in CD3 was necessary to obtain preclearance from the DOJ.[92] He based that opinion on his understanding that the black-majority districts in the House-of-Delegates plan had all exceeded 55% BVAP and that several alternatives, having less than 55% BVAP, had been rejected.[93] Plaintiffs also pointed to floor statements by legislators in 2011 that referenced their belief in a 55%-BVAP floor.[94] In addition, Virginia's § 5 submission touted the 56% BVAP of Enacted CD3 as being "over 55 percent,"[95] comparing it to other proposed plans that would have resulted in BVAP "below 55 percent."[96] At trial, however, Morgan denied having personal knowledge that General Assembly members applied a 55% floor or quota.[97]

4. The divided three-judge district court held that CD3 was an unconstitutional racial gerrymander, enjoined Virginia from conducting any further congressional elections under the 2012 plan, and "require[d] that new districts be drawn during Virginia's

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[91] Tr. 242:17-25.

[92] Tr. 351:20-353:8; IX 13 at 26-27.

[93] Tr. 327:14-328:23; IX 13 at 26-27.

[94] PX 45 at 7-8; IX 30 at 13-14; IX 32 at 18, 20, 22.

[95] PX 6 at 2.

[96] *Id.* at 3, 4.

[97] Tr. 328:24-330:1.

next legislative session to remedy the unconstitutional districts."[98] After the Congressmen appealed, this Court vacated the judgment and remanded for further consideration in light of *Alabama*.[99]

On remand, the district court concluded, again, that CD3 was unconstitutional and that *Alabama* supported that conclusion. Writing for the majority, Judge Duncan explained that the "legislative record here is replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan."[100] The court also found that the legislature used "a 55% BVAP floor" in redrawing CD3.[101]

With regard to the experts' testimony, the majority found McDonald's testimony credible; the court rejected the defense claim that McDonald's analysis was discredited by his earlier law review article, written before he had all of the relevant facts.[102] The majority also discounted the testimony of the defense expert. The court found "significant" that Morgan

> proffers no academic work, does not have an advanced degree, that his undergraduate degree was in history, that he has never taken

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[98] *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 554-55 (E.D. Va. 2014), *vacated and remanded sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

[99] *Cantor*, 135 S. Ct. at 1699.

[100] JS 18a.

[101] JS 20a-21a.

[102] JS 21a-22a n.16.

> a course in statistics, that he has not performed a racial bloc voting analysis, that he did not work with or talk to any members of the Virginia legislature, and that he miscoded the entire city of Petersburg's VTDs.[103]

Finding that race was the predominant consideration in the redistricting, the majority applied strict scrutiny. It concluded that, while compliance with § 5 was a compelling state interest,[104] the legislature's use of race was not "narrowly tailored" to meet that interest. In particular, "the 2012 Plan was not informed by a racial bloc voting or other, similar type of analysis."[105] The General Assembly, moreover, increased the BVAP in CD3 from 53.1% to 56.3%, despite that Congressman Bobby Scott, "a Democrat supported by the majority of African-American voters," was being re-elected with 70% of the vote.[106] Under Enacted CD3, "he won by an even larger margin, receiving 81.3% of the vote" in the 2012 election.[107]

Having found the 2012 plan unconstitutional, the court enjoined any further elections under that plan

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[103] *Id.*

[104] JS 36a-38a.

[105] *Id.* 9a; *see also id.* 21a ("[T]he use of a 55% BVAP floor in this instance was not informed by an analysis of voter patterns.").

[106] JS 40a; *see* PX 27 at 11.

[107] JS 40a; *see* PX 27 at 11.

until a new redistricting plan is adopted.[108] The court gave the Virginia General Assembly until September 1, 2015 to adopt a new plan.[109]

In dissent, Judge Payne reached opposite conclusions about the experts' credibility. He flatly rejected McDonald's testimony,[110] concluding that "McDonald's views, in whole and in its constituent parts, are not entitled to any credibility."[111] He believed Morgan's testimony instead.[112] Judge Payne also concluded that statements by Delegate Janis about the importance of nonretrogression in CD3 failed to prove that race was the predominant factor in the redistricting.[113] And he was unpersuaded that the legislature imposed a 55%-BVAP floor in redrawing CD3, characterizing the evidence on which the majority relied as "a patchwork quilt."[114]

The Congressmen filed a timely notice of appeal.

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[108] JS 94a.

[109] *Id.*

[110] JS 48a-53a.

[111] JS 53a.

[112] JS 83a-85a.

[113] JS 62a.

[114] JS 66a-67a.

ARGUMENT

As the district court recognized when it denied summary judgment,[115] the facts concerning the General Assembly's motives in redrawing CD3 were hotly contested. We joined with the Congressmen to defend Enacted CD3 at trial. Had the majority viewed the evidence as we argued, Enacted CD3 would not have been found unconstitutional. But the majority did not see it that way.[116]

Now that the case is on appeal, the district court's findings can be reviewed "only for 'clear error.'"[117] The Court may not reverse such findings simply because it "would have decided the case differently."[118] Rather, under the "clearly erroneous" standard, the question is "whether 'on the entire evidence,' [the Court] is 'left with the definite and

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[115] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Jan. 27, 2014), ECF No. 50.

[116] In noting that the current Attorney General of Virginia, Mark R. Herring, did not appeal, Judge Payne may have incorrectly implied that the previous Attorney General, a Republican, was the one who defended the plan at trial. JS 45a n.30. In fact, General Herring was inaugurated on January 11, 2014, and his office defended the plan alongside the Congressmen at the May 2014 trial. Only after the district court declared that plan unconstitutional, on October 7, 2014, did the Attorney General decline to appeal.

[117] *Easley*, 532 U.S. at 242 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

[118] *Id.*

firm conviction that a mistake has been committed.' "[119]

That demanding standard simply cannot be met here. Reviewing the trial record in the "light most favorable" to plaintiffs,[120] as the Court must, the evidence supported the majority's findings that (1) race predominated in drawing CD3 and (2) the Enacted Plan was not narrowly tailored to avoid retrogression under § 5. Accordingly, the Court should affirm.

I. The district court did not commit clear error in finding that race was the predominant factor in redrawing CD3.

A. Substantial evidence supported the majority's finding that race was the predominant factor and that the General Assembly used a 55%-BVAP floor.

There were two categories of direct evidence on which the majority could reasonably conclude that race predominated in drawing CD3.

First, Delegate Janis, the plan's sole author, insisted in the floor debates that nonretrogression in CD3 was the "primary focus"[121]—indeed, the

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[119] *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[120] *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993).

[121] PX 43 at 25:14.

"paramount,"[122] "nonnegotiable"[123] concern. Although the dissent below identified some statements by Janis that suggested that race was one of several factors,[124] quoting prepared remarks twice given by Janis,[125] the majority did not commit clear error in relying on Janis's unscripted comments to conclude that race was the predominant factor.

Second, the majority found that the General Assembly applied a 55%-BVAP floor when it concentrated black voters in CD3. That point was advanced by the Congressmen's and the defendants' own expert, Morgan, who had served as the Republican consultant for the House-of-Delegates redistricting plan in 2011. Morgan stated under oath[126] that the legislature used a 55%-BVAP floor in revising CD3:

> [T]he General Assembly enacted, with strong support of bipartisan and black legislators, a House of Delegates redistricting plan with a 55% [BVAP] *as the floor for black-majority districts* . . . including districts within the geography covered by Congressional District 3. The General Assembly . . . had ample reason to believe that legislators of both parties,

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[122] *Id.* at 25:8.

[123] *Id.* at 25:10.

[124] JS 54a-56a.

[125] *Compare* PX 43 at 2-6 (statement of Del. Janis on floor of House of Delegates), *with* IX 9 at 4-9 (statement of Del. Janis to Senate Committee on Privileges and Elections).

[126] IX 13 at 28.

> including black legislators, viewed the 55% [BVAP] for the House of Delegates districts as appropriate to obtain Section 5 preclearance, even if it meant raising the [BVAP] above the levels in the benchmark plan. *The General Assembly acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the District 3 [BVAP] at 56.3%.*[127]

Although Morgan later claimed that he lacked personal knowledge of any 55%-BVAP floor,[128] the majority did not commit clear error in relying on the prior admission,[129] particularly in light of the corroborating evidence offered by plaintiffs. Virginia's § 5 submission advocated the 56.3% BVAP of Enacted CD3 as being "over 55 percent,"[130] comparing it to other alternative plans that would have resulted in BVAP "below 55 percent."[131] Plaintiffs also introduced floor debates in which Delegate Morrissey asked Janis: "[I]s there any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50? Or is it just a number that has been pulled out of the air?"[132] Janis responded that his plan (exceeding 55% BVAP) made getting

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[127] *Id.* at 26-27 (emphasis added); Tr. 351:20-352:25.

[128] Tr. 328:24-330:25.

[129] JS 20a-21a.

[130] PX 6 at 2.

[131] *Id.* at 3, 4.

[132] PX 45 at 7:9-12.

§ 5 preclearance a "certainty," whereas the 40% BVAP in Senator Locke's competing plan jeopardized preclearance.[133] Plaintiffs also introduced the floor debates on the House-of-Delegates redistricting plan, containing several statements about the need for a 55%-BVAP floor in order to obtain DOJ preclearance.[134]

The dissenting judge discounted the evidence on which the majority relied, but he was mistaken about a key assumption. The dissent explained that:

> Notwithstanding the fact that these opponents of the Enacted Plan had every reason to characterize the Enacted Plan in the harshest terms possible (i.e., as race driven

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[133] *Id.* at 7:13-8:20.

[134] *E.g.*, IX 30 at 13:23-25 (statement of Del. Dance that population shifts were required between three districts to get "at least 55 percent performing" in majority-minority districts); IX 32 at 18:11-16 (statement of Del. Vogel that "when it came to Section 5—I just want to be very clear about this—that we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0"); *id.* at 20:8-11 ("We were just simply following what, I believe, is not subject to any question; that is, as of today, the lowest percentage that the Department of Justice has ever approved is 55.0."); *id.* at 22:6-12 ("But it has been the position of the Department of Justice, and I will speak to this very confidently, that 55.0 is the percentage that they believe is what is qualified, and that has been, at least in the past to date, their position regarding what it would take to be able to elect a candidate of your choice, whomever that might be.").

> or as the product of a racial quota), they did not do so.[135]

In fact, Senator Locke condemned the plan precisely because CD3 "has been packed" with black voters, so that "those African-Americans living in the 1st, 2nd, and 4th congressional districts that abut the 3rd are essentially disenfranchised."[136] Senator McEachin likewise characterized the plan as "packing" African Americans into "a single congressional district, more than what is necessary to elect a candidate of choice," thereby "depriving minorities of their ability to influence elections elsewhere."[137]

"The issue in this case is evidentiary."[138] The district court resolved the conflicting evidence by finding that the General Assembly imposed a 55%-BVAP floor in drawing CD3 to meet the "primary," "paramount," and "nonnegotiable" goal of avoiding retrogression. Because sufficient direct evidence supported that conclusion, it was not clearly erroneous.

That direct evidence distinguishes this case from *Easley*, on which the Congressmen rely. In *Easley*, there was scant evidence that race played a significant role in the North Carolina legislature's redistricting. The strongest evidence of racial motivation was the redistricting leader's comment that "I think

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[135] JS 69a (Payne, J., dissenting).

[136] PX 47 at 16:2-6.

[137] *Id.* at 22:3-10.

[138] *Easley*, 532 U.S. at 241.

that overall [the plan] provides for a fair, geographic, *racial* and partisan balance throughout the State of North Carolina."[139] Five justices found that comment insufficient to prove that race predominated,[140] while the four other justices thought it adequate under the highly deferential, clear-error standard of review.[141]

In contrast to *Easley*, there was ample direct evidence in this case, viewed in the light most favorable to plaintiffs, that race was the predominant consideration. The majority of the district court so found, and that finding was not clearly erroneous.[142]

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[139] *Id.* at 253 (emphasis added).

[140] *Id.* ("We agree that one can read the statement about 'racial . . . balance' . . . to refer to the current congressional delegation's racial balance. But even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a *predominant* role comparatively speaking.").

[141] *Id.* at 266 n.8 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

[142] The district court's finding that race predominated in drawing CD3 does not mean that race predominated in Virginia's other redistricting plans. *See Alabama*, 132 S. Ct. at 1265 ("A racial gerrymandering claim . . . applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'").

B. It was not clear error to reject the claim that the legislature intended to preserve an 8-3 split in Virginia's congressional delegation.

Contrary to the claim in the Jurisdictional Statement, it was not "undisputed" at trial that the purpose of the Enacted Plan was to preserve an 8-3 split favoring Republicans in Virginia's congressional delegation.[143] That point was contested and the district court cannot be said to have committed clear error in resolving the evidentiary conflict in the plaintiffs' favor.

First, Delegate Janis stated unequivocally that he had *not* "looked at . . . partisan performance"; it "was not one of the factors that I considered in the drawing of the district."[144] That statement does not square with the claim that Janis, as the plan's sole author, intended to cement an 8-3 split favoring Republicans.

Second, there was no direct evidence to support the 8-3-split theory. Janis said that he drew the districts "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections."[145] But the majority found that statement "ambiguous."[146] It was similar to

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[143] JS 17-18.

[144] IX 9 at 14:11-13.

[145] PX 43 at 4:6-8.

[146] JS 33a.

Janis's statement that his plan respected "the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together."[147] Making sure that two incumbents do not have to run against one another is different from concentrating partisan support in order to entrench an 8-3 split.

Likewise, while Janis said that each congressman had approved the lines for his own district,[148] he also said that no congressman had seen the totality of the plan.[149] The Congressmen's sworn interrogatory answers also conflicted with the 8-3-split theory by, for example:

- not mentioning that partisan considerations informed their comments to Janis;[150]
- omitting any mention of having spoken to Janis;[151]

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[147] PX 43 at 4:15-18.

[148] *Id.* at 5:24-6:6.

[149] IX 9 at 9:6-7, 13:23-14:2

[150] PX 36 at 3 (Rep. Griffith) ("I had a conversation [with Janis] regarding redistricting and stated something along the lines of 'I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District.'").

[151] PX 39 at 1-2 (Rep. Wittman); PX 38 at 1-2 (Rep. Rigell); PX 40 at 1 (Rep. Wolf).

- denying that they had any input into his plan;[152] or
- attesting to their lack of knowledge about how the plan was developed.[153]

Given the comparatively weak evidence supporting the 8-3-split theory, the district court did not commit clear error by crediting Janis's explicit testimony that he did not look at partisan performance in drawing the plan. The Congressmen credit Janis's other, more ambiguous statements as a "display of candor rarely seen among legislators engaged in redistricting."[154] But the majority was entitled to find Janis's direct testimony on point to be candid and, on this point, dispositive—particularly when corroborated by the Congressmen's own interrogatory answers.

Third, plaintiffs adduced circumstantial evidence that race predominated over politics. Their expert, McDonald, testified that:

- "The district is bizarrely shaped. It stretches from Richmond to Norfolk

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[152] PX 34 at 1-2 (Rep. Forbes) ("Janis asked for my feedback and comments on the redistricting plan, but I did not provide any.").

[153] PX 33 at 2 (Rep. Cantor) ("I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting . . . ."); PX 35 at 2 (Rep. Goodlatte), PX 36 at 6 (Rep. Griffith), PX 37 at 2 (Rep. Hurt), PX 38 at 2 (Rep. Rigell) (all same, verbatim).

[154] JS 20.

skipping back and forth across the James River mostly to capture predominantly African-American communities."[155] In Norfolk, for example, "it wraps around a small—three predominantly white precincts that are not connected to the Second District via bridge or anything else. They are only connected by water."[156]

- Enacted CD3 is the least compact[157] and least contiguous[158] of Virginia's 11 congressional districts; it also splits more localities and VTDs than any other district.[159]

- Benchmark CD3 was underpopulated by 63,976, but 180,000 people were moved between districts to net the number required.[160] As a result, the percentage of black voters moved into CD3 was disproportionately high compared to groups moved out of CD3.[161] And several highly Democratic-performing but largely white VTDs that could have been included in

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[155] Tr. 42:13-16.

[156] Tr. 43:8-11; *see* PX 27 at 4 (map).

[157] Tr. 74:5-13.

[158] Tr. 74:18-76:9.

[159] Tr. 76:10-79:3.

[160] Tr. 87:3-16.

[161] Tr. 83:25-87:6.

> CD3 were left out in favor of denser black VTDs.[162]

It is true that McDonald had written a law review article before his expert engagement in which he said that the 2012 redistricting plan was consistent with preserving an 8-3 split. Judge Payne, in dissent, found that McDonald's earlier writing impeached his trial testimony.[163] But the majority found McDonald's trial testimony credible and believed his explanation that when he wrote that article, he: had not yet read the legislative history; had not performed a racial bloc voting analysis; had not yet analyzed population trades between districts; and had not drawn any conclusions about whether race was the predominant factor in redrawing CD3.[164]

As for the defense expert, the majority discounted Morgan's contrary testimony that politics explained CD3, pointing to Morgan's weaker credentials and the analytical errors exposed at trial.[165] Judge Payne, by contrast, believed Morgan's testimony.[166]

When, as here, reasonable triers of fact hearing the same evidence could have decided the case differently or formed different opinions about the credibility of the parties' respective experts, "such questions

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[162] Tr. 89:6-23.

[163] JS 48a-53a.

[164] JS 21a n.16; *see* Tr. 226:4-21.

[165] JS 21a n.16.

[166] JS 83a.

of credibility are matters for the District Court."[167] And credibility determinations such as these "can virtually never be clear error."[168]

C. Plaintiffs were not required to submit an alternative plan in order to prove that racial considerations predominated, but the plan they submitted supported that conclusion as well.

Relying on *Easley*, the Congressmen argue that the plaintiffs had the burden to introduce an alternative plan to show how the districts could have been redrawn consistent with traditional redistricting principles while bringing about greater racial balance.[169] They claim that the Alternative Plan offered by McDonald[170] was insufficient to meet that burden.

Assuming that plaintiffs had that burden, there was sufficient evidence that they met it. McDonald's Alternative Plan used a BVAP of 50.2% in CD3,[171] significantly less than the 56.3% in the Enacted Plan. And sufficient evidence supported the majority's conclusion that his plan "maintains a majority-minority district and achieves the population increase needed for parity, while simultaneously minimizing

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[167] *Bush v. Vera*, 517 U.S. 952, 970 (1996) (plurality).

[168] *Anderson*, 470 U.S. at 575.

[169] JS 10-11, 24.

[170] PX 29 (analysis), 49 (maps).

[171] PX 29 at 1, 8.

locality splits and the number of people affected by such splits."[172] Indeed, McDonald testified so at length.[173]

The Jurisdictional Statement overstates the claim that the Enacted Plan better preserved the cores of existing districts than the Alternative Plan. Although the Alternative Plan preserved 69.2% of the core of Benchmark CD3, compared to 83.1% under Enacted CD3, 69.2% was not significantly worse than in Enacted CD11, which preserved 71.2% of the benchmark district.[174] Moreover, Morgan conceded on cross-examination that the *total* average difference in core preservation for the Enacted Plan and the Alternative Plan across all 11 districts was only 1.5%.[175] And McDonald testified that the range of core-preservation statistics for the two plans was "substantially similar"[176] and that the difference was "not significant."[177]

The majority rejected the defense's main criticism of the Alternative Plan—that it failed to preserve an alleged 8-3 split in favor of Republicans—not only finding that claim "overstated" but rejecting the premise that the legislature intended to ensconce an

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[172] *See* JS 28a.

[173] Tr. 109-17; *see also* PX 29.

[174] IX 27; *see also* Tr. 312:2-24.

[175] Tr. 383:5-12.

[176] Tr. 420:8-9.

[177] Tr. 421:15-20.

8-3 split.[178] As shown in the previous section, the majority's conclusion on that point was supported by substantial evidence and is not clearly erroneous.

More fundamentally, this Court has not required a plaintiff to offer an alternative plan in a direct-evidence case like this one. An alternative plan is a tool that may reveal the role that race played in a circumstantial-evidence case. "[B]izarreness" of shape likewise may be "circumstantial evidence" of racial gerrymandering, yet no "threshold showing" of bizarreness is necessary in every case.[179] Even the dissent below agreed that a plaintiff "is not confined in its form of proof to submitting an alternative plan."[180]

Nor does *Easley* require proof of an alternative plan in every redistricting challenge. The Court there found the evidence too weak to "show that racial considerations predominated in the drawing of the District's . . . boundaries."[181] In the next paragraph—on which the Congressmen rely—the Court then said:

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[178] JS 16a n.12 ("[T]he significance of the discrepancy between these political outcomes is overstated, and relies on an assumption that the legislature's political objective was to create an 8-3 incumbency protection plan. This inference is not supported by the record.") (citation omitted).

[179] *Miller*, 515 U.S. at 912-13.

[180] JS 89a.

[181] 532 U.S. at 257.

> In a case *such as this one* where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.[182]

The context shows that the Court was talking about cases with only weak evidence of racial motivation, not cases involving direct evidence of racial engineering. Without direct evidence, a plaintiff necessarily must use other means to show discriminatory purpose—such as analysis of shape, compactness, contiguity, or an alternative plan that meets the legislature's permissible redistricting goals without undue reliance on race. Circumstantial proof is unnecessary when *direct* evidence proves that race predominated.

Alabama makes that distinction plain:

> We have said that the plaintiff's burden in a racial gerrymandering case is "to show, *either* through *circumstantial* evidence of a district's shape and demographics *or* more *direct* evidence going to legislative purpose,

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[182] *Id.* at 258 (emphasis added).

> that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." [*Miller*, 515 U.S. at 916]. *Cf. Easley v. Cromartie*, 532 U.S. 234, 258 [ ] (2001) (explaining the *plaintiff's burden* in cases, *unlike these*, in which the State argues that politics, not race, was its predominant motive).[183]

The "*Cf.*" citation to *Easley*, coupled with the Court's parenthetical summary distinguishing plaintiffs' burden in direct-evidence cases like *Alabama*, make clear that the burdens *Easley* described do not apply in direct-evidence cases like this one.

Indeed, if the Congressmen's argument were right, then a plaintiff would lose a redistricting challenge—despite direct evidence of racial packing and smoking-gun admissions of racial animus—simply because the plaintiff failed to offer an alternative plan to reduce such packing. That notion is foreign to the "well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts."[184]

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[183] 135 S. Ct. at 1267 (emphasis added).

[184] *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014).

II. The district court did not commit clear error in finding that the legislature's use of race was not narrowly tailored to protect minority voters' ability to elect their candidate of choice.

"If race is the predominant motive in creating [a district], strict scrutiny applies, and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive."[185] The district court was correct in ruling that compliance with the nonretrogression requirements of § 5 constituted a compelling state interest in 2012, when the district was redrawn.[186] This Court has repeatedly assumed that compliance with the Voting Rights Act is a compelling state interest.[187]

As for narrow tailoring, § 5 compliance cannot justify the use of race-conscious measures that are *unnecessary* to avoid retrogression:

> Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to

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[185] *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (citation omitted).

[186] JS 14a, 36a-38a.

[187] *E.g.*, *Abrams*, 521 U.S. at 91; *Bush*, 517 U.S. at 977 (plurality); *see also Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). The Court has left open whether "continued compliance with § 5 remains a compelling interest" in light of *Shelby*. 135 S. Ct. at 1274.

> elect representatives of its choice not be diminished, directly or indirectly, by the State's actions.[188]

In other words, a reapportionment plan is "not . . . narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."[189]

The district court did not commit clear error in concluding that Enacted CD3 flunked that test. No functional voting analysis supported the need to increase the BVAP in CD3 to 56.3%, let alone to impose a 55%-BVAP floor.[190] CD3 had been "a safe majority-minority district for 20 years."[191] Congressman Scott, supported by the majority of African-American voters, was already winning 70% of the vote when running against Republican opponents.[192] Under Enacted CD3, he defeated the Republican candidate in 2012 with 81.3% of the vote.[193] Indeed, McDonald testified that his racial bloc voting analysis showed that the candidate of choice of African-American voters could have been elected even if CD3 had a BVAP as low as 30%.[194]

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[188] *Bush*, 517 U.S. at 983 (plurality opinion).

[189] *Id.* (quoting *Shaw I*, 509 U.S. at 655).

[190] JS 9a, 20a-21a, 37a n.26, 42a.

[191] JS 40a.

[192] *Id.*; PX 27 at 11.

[193] JS 40a; PX 27 at 11.

[194] Tr. 196:14-197:25.

Nor did the majority err in rejecting the argument that the plan needed to exceed a 55%-BVAP floor in order to obtain § 5 preclearance.[195] The DOJ's 2011 guidance made clear that no such floor was required and that DOJ looks for "a functional analysis" of electoral performance.[196] In fact, DOJ had precleared CD3 in 1998 with a BVAP of 50.47%.[197] And McDonald testified that DOJ, in 2011, precleared five majority-black Senate districts in Virginia with BVAP percentages less than 55%, including one with a BVAP of 50.8%.[198] In spite of those facts, the Janis plan did not merely maintain the existing BVAP percentage in CD3 but materially augmented it.[199] Given its findings of fact, the district court was correct that permitting the use of racial floors unsupported by any functional analysis would give a State "carte blanche to engage in racial gerrymandering in the name of nonretrogression."[200] That theory would dangerously resemble a "one-way ratchet: the black population of a district could go up, either through demographic shifts or redistricting plans . . . [b]ut the

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[195] JS 41a-42a.

[196] 76 Fed. Reg. at 7,471; *see* Tr. 62-63.

[197] Tr. 48:5-12; PX 50.

[198] Tr. 102:1-103:11; *see* PX 30 at 2.

[199] *Cf. Bush*, 517 U.S. at 983 ("The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage . . . .").

[200] JS 39a (quoting *Shaw I*, 509 U.S. at 654).

legislature could never lower the black percentage . . . ."[201]

The district court did not err in its narrow-tailoring conclusion because, quite simply, the Congressmen and defendants did not offer their *own* evidence on narrow tailoring. Once plaintiffs showed that race predominated, the burden shifted to the defense to prove that the use of race in fashioning CD3 was narrowly tailored to avoid retrogression.[202] Yet Morgan, the only defense witness, testified that he was offering *no opinion* on the narrow-tailoring question.[203] That admission was dispositive. The narrow-tailoring prong in a redistricting case "allows the States a limited degree of leeway" in complying with the Voting Rights Act, provided the State has a "'strong basis in evidence'" to conclude that the majority-minority district "is reasonably necessary to comply" with the law.[204] There could be no such

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[201] *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1340 (D. Ala. 2013) (Thompson, J., dissenting), *rev'd*, 135 S. Ct. 1257 (2015).

[202] *E.g.*, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) ("Strict scrutiny requires the [government] to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.)).

[203] Tr. 349:16-23.

[204] *Bush*, 517 U.S. at 977 (plurality); *Alabama*, 135 S. Ct. at 1274.

"strong basis in evidence" in the absence of any evidence to carry that burden.

That evidentiary gap cannot be bridged by pointing to the *plaintiffs'* Alternative Plan. As shown above, sufficient evidence supported the majority's conclusion that the Alternative Plan would have met the legislature's redistricting goals while improving racial balance. But more importantly, strict scrutiny requires the *government* to prove "that its use of [race] is necessary . . . to the accomplishment of its purpose."[205] Showing that someone else's plan would not work does not show that the government needed to use a mechanical racial floor in order to protect minority-voting rights.

* * *

"It is a sordid business, this divvying us up by race."[206] "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."[207] Such explicit reliance on race "threatens to carry us further from the goal of a political system in

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[205] *Fisher*, 133 S. Ct. at 2418 (quotation and citation omitted); *see also id.* at 2419 ("Strict scrutiny is a searching examination, and it is the government that bears the burden . . . .").

[206] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

[207] *Shaw I*, 509 U.S. at 657.

which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."[208]

The Congressmen make good arguments about their view of the conflicting evidence; we joined those arguments in the district court. But the majority of the three-judge court did not agree with that view of the evidence and resolved the many factual conflicts in plaintiffs' favor. This case must be assessed in light of the majority's factual findings, its credibility determinations, and the clear-error standard. And that assessment mandates affirmance.

In light of its conclusion that the Enacted Plan is unconstitutional, the district court was also correct about the need to proceed expeditiously.[209] Virginians in the "Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm."[210] They "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan."[211]

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[208] *Id.*

[209] JS 43a.

[210] *Id.*

[211] *Id.* (quoting *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981)).

CONCLUSION

The Court should summarily affirm.

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July 22, 2015

No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether Appellants lack standing because none of them reside in or represent the only congressional district whose constitutionality is at issue in this case.

2. Whether the three-judge panel correctly found that Virginia's Third Congressional District is a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF AUTHORITIES	(iii)
STATEMENT	1
ARGUMENT	6
I. APPELLANTS LACK STANDING	6
II. RACE WAS THE PREDOMINANT FACTOR IN DRAWING CD3	8
A. The Legislature's Redistricting Criteria	9
B. Del. Janis's Statements	9
C. BVAP Threshold	17
D. Traditional Redistricting Principles	20
E. Racial Sorting of VTDs	23
III. THE PANEL PROPERLY APPLIED THE PREDOMINANCE INQUIRY	24
A. The Panel Found that Race Predominated over Politics	24
B. *Easley's* Circumstantial Evidence Requirement Is Inapplicable	26
C. Appellees' Alternative Plan Further Shows that Race Predominated	29
IV. THE PANEL PROPERLY APPLIED STRICT SCRUTINY	31
CONCLUSION	33

TABLE OF AUTHORITIES

CASES	Page(s)
Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015)	*passim*
Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)	6, 7
Bush v. Vera, 517 U.S. 952 (1996)	4, 12, 17
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	17
Diamond v. Charles, 476 U.S. 54 (1986)	6
Easley v. Cromartie, 532 U.S. 234 (2001)	*passim*
Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)	6, 7
Johnson v. Mortham, 915 F. Supp. 1529 (N.D. Fla. 1995)	8
Miller v. Johnson, 515 U.S. 900 (1995)	*passim*
Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997)	1, 21, 33
Raines v. Byrd, 521 U.S. 811 (1997)	6
Shaw v. Hunt, 517 U.S. 899 (1996)	5, 11, 21
Shaw v. Reno, 509 U.S. 630 (1993)	20, 21

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Hays,
515 U.S. 737 (1995) 8

REGULATIONS

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011) 32

CONSTITUTIONAL

Va. Const. art. II, § 6 21

STATEMENT

This is the second time that Virginia's Third Congressional District ("CD3") has come before the Court this redistricting cycle. The three-judge panel below (the "Panel") has twice held that CD3 is an unconstitutional racial gerrymander. It did so on the strength of direct evidence, including explicit statements by the current Congressional Redistricting Plan's (the "Plan" or "Enacted Plan") architect, Delegate Bill Janis, that CD3 resulted from the exaltation of race above all other factors and the use of a predetermined 55% black voting age population ("BVAP") threshold without any evidence that it was necessary to comply with the Voting Rights Act ("VRA").

CD3's racial purpose manifests in its appearance. It is a bizarrely shaped district that starts north of Richmond and slides down the northern shore of the James River, ending abruptly at the James City border. It then jumps over James City and lands in a horseshoe shape in Newport News. It leaps over southern and eastern Newport News and stops in Hampton. CD3 then starts anew on the southern shore of the James River, darting west to swallow Petersburg and then sliding east through Surry. It hops over the Isle of Wright, covers Portsmouth, and runs up into Norfolk, tearing CD2 in two on either side of Norfolk. Pl. Ex. 48. As currently constituted, CD3 closely resembles the 1991 district deemed an unconstitutional racial gerrymander in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997). In a description that applies today, that court described CD3's predecessor as "a grasping claw." *Id.* at 1147. Then, as now, "[e]very one of the [district's] fingers which reaches . . . into the divided

cities, uses . . . barren stretches of river, or other dubious connectors . . . in an effort to reach the black populations which it excises from the various cities." *Id.*; Pl. Ex. 48.

Since 1991, CD3 has been represented by Congressman Bobby Scott, who has consistently won reelection by comfortable margins and received the support of most African-American voters in the district. Nevertheless, in the 2012 redistricting, the BVAP in CD3 increased above the 55% BVAP threshold, creating a district in which Congressman Scott won his last election with 81.3% of the vote. J.S. App. 40a. The record showed that the Virginia General Assembly's explicit racial goals were achieved by purposefully moving high-density BVAP areas into CD3, while excluding lower-density BVAP areas. *See* Pl. Ex. 28 at 6-7; Tr. 87:18-89:23, 397:13-403:13.

In October 2013, three Virginia voters residing in CD3 filed this action challenging CD3 as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶ 1. Appellants, current and former Republican congressmen, intervened as Defendants. The case went to trial in May 2014, during which neither the State Defendants[1] nor Appellants presented any witnesses in defense of the Plan, save for Appellants' expert, John Morgan. On October 7, 2014, the Panel ruled that CD3 was an unconstitutional racial gerrymander. The State Defendants did not appeal.

The Court made no substantive rulings with respect to Appellants' first appeal. Rather, after deciding *Alabama Legislative Black Caucus v. Alabama*, 135 S.

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[1] Defendants are the Chair, Vice-Chair, and Secretary of the State Board of Elections, sued in their official capacity.

Ct. 1257 (2015), the Court remanded this case for further consideration.

On remand, the Panel asked the parties to brief the effect of *Alabama* on its prior decision. The Panel then issued its opinion reaffirming its prior decision and explaining why *Alabama* further bolstered its conclusion that CD3 was an unconstitutional racial gerrymander. Again, Appellants appealed. Again, the State Defendants did not.

The record fully supports the opinion below and is profoundly at odds with Appellants' effort to rewrite the record. On appeal, the Court reviews the Panel's factual findings only to determine whether they are "clearly erroneous." *Miller v. Johnson*, 515 U.S. 900, 917 (1995). In the face of this exacting standard governing their appeal, Appellants ask the Court to reverse based on little more than Appellants' unsupported claim that CD3 was really a partisan gerrymander.

This is revisionist history of the first order that flatly contradicts the evidentiary record below, including Del. Janis's repeated and unequivocal statements that achieving a particular racial composition in CD3 was his "primary focus," of "paramount concern[]," and considered "nonnegotiable." Pl. Ex. 43 at 10, 25. Moreover, Del. Janis denied that the unique features of CD3 resulted from a partisan purpose, stating without qualification: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." Int.-Def. Ex. 9 at 14.

The Court should dismiss the appeal or summarily affirm the Panel's opinion.

First, Appellants lack standing to pursue this appeal: none of them are representatives or claim to be residents of CD3, which is the only congressional district whose constitutionality is at issue. Any claim that they will be injured if Virginia's Republican-controlled General Assembly redraws CD3 is speculative at best and in some cases specious—two Appellants are no longer congressional representatives.

Second, even if the Court were to find that it has jurisdiction, the appeal fails to raise a substantial federal question. Appellants' jurisdictional statement is rife with serious legal errors and misstatements about the record. The standard for a racial gerrymandering claim is well established. A plaintiff must show that race was the "predominant" factor motivating the districting decision in question. *Alabama*, 135 S. Ct. at 1262. The defendant must then satisfy strict scrutiny by showing that the use of race was narrowly tailored to serve a compelling government interest. *See id.*; *see also Bush v. Vera*, 517 U.S. 952, 976 (1996). From the outset, Appellants attempt to rewrite this standard, arguing that plaintiffs must show an "improper" consideration of race. J.S. 24 n.1.[2] This is not the law. Rather, plaintiffs may meet their burden of showing that race predominated where race-based districting decisions were made in the belief

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[2] Based on this invented standard, Appellants conceded below that "compliance with Section 5 [of the VRA] was the General Assembly's predominant purpose . . . underlying District 3's racial composition in 2012." Int.-Def. Mem. Supp. Summ. J. 15; *see also* J.S. App. 19a. Appellants have run from this concession ever since. *See, e.g.*, J.S. 24 n.1 (asserting that their after-the-fact concessions about legislative motives "are plainly irrelevant").

that they were necessary to comply with the VRA. *See, e.g.*, *Alabama*, 135 S. Ct. at 1271; *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) ("*Shaw II*").

The record is replete with evidence that race in fact predominated in the drawing of CD3. In addition to Del. Janis, other legislators repeatedly indicated that CD3 was drawn to meet a 55% BVAP floor, a blanket threshold corroborated by Virginia's Section 5 submission to the Department of Justice ("DOJ") and even Appellants' own expert. The district's bizarre shape, disregard of traditional redistricting criteria, and its demographic characteristics only confirm what is demonstrated directly by the legislative record.

Given the overwhelming weight of the evidence against them, Appellants conjure a supposed legal error, arguing that the Panel "failed to apply" the law as articulated in *Alabama*. J.S. 2. This not only mischaracterizes the Panel's decision, it ignores the dissent below, which had no quarrel with the majority's legal analysis (only its factual findings). *See* J.S. 45a ("[T]he original majority opinion . . . applied the proper analytic framework as specified by *Alabama*. So[] too, do[es] the majority opinion . . . following remand.").

Appellants' argument that the Panel misapplied the narrow tailoring requirement is equally flawed. Appellants cannot wish away the fact that the General Assembly engaged in no analysis whatsoever to determine whether the VRA compelled its race-based approach. The General Assembly made the same mistake as did the legislature in *Alabama*. It "asked the wrong question" by focusing on how it could it draw CD3 to comply with an arbitrary, mechanical, racial threshold. *Alabama*, 135 S. Ct. at 1274. It failed to ask the *right* question: "To what extent must we

preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.*

The Court should dismiss this appeal or, in the alternative, summarily affirm the decision of the Panel below.

ARGUMENT

I. APPELLANTS LACK STANDING

The Court lacks jurisdiction to hear this appeal because Appellants lack standing to pursue it. Federal courts have jurisdiction only over "cases" or "controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). This is "an essential limit" to the federal judiciary's power that requires more than "the party invoking the power of the court hav[ing] a keen interest in the issue." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). Both plaintiffs *and* defendants must have because Article III standing because "standing to sue *or defend* is an aspect of the case or controversy requirement." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (emphasis added).

An intervenor need not establish independent Article III standing *if* there is another party with standing on the same side of the case. But if the party with standing chooses not to appeal, there is no case or controversy. *See Diamond v. Charles*, 476 U.S. 54, 63-64 (1986) ("By not appealing the judgment below, the State indicated its acceptance of that decision . . . . The State's . . . failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State.").

Thus, where, as here, an intervenor appeals alone, it must show that it has standing. *Hollingsworth*, 133

S. Ct. at 2659; *Arizonans*, 520 U.S. at 65 (an intervening party "cannot step into the shoes of the original party" unless the intervening party independently "fulfills the requirements of Article III").

To show standing in a racial gerrymandering case, a litigant must make a "district-specific" showing that it has suffered a "personal" harm. *Alabama*, 135 S. Ct. at 1265. For example, a racial gerrymandering plaintiff generally lacks standing unless he or she resides in the district being challenged. *Id.*

Here, Appellants are ten past and current members of Virginia's congressional delegation. Appellants represent the following districts: Robert J. Wittman–CD1, Bob Goodlatte–CD6, Barbara Comstock–CD10, Randy J. Forbes–CD4, Morgan Griffith–CD9, Scott Rigell–CD2, Robert Hurt–CD5, and David Brat—CD7. Appellants Eric Cantor and Frank Wolf are former representatives.

None of the Appellants reside in or represent CD3, the only district whose constitutionality is at issue. Nor do Appellants have special legal authority for redistricting or the conduct of Virginian elections—those jobs belong to the state's General Assembly and Board of Elections, respectively, and the state's attorney has not sought review of the decision below. Thus, Appellants have not suffered any "direct injury" because of the Panel's decision, which "ha[s] not ordered [Appellants] to do or refrain from doing anything," and Appellants cannot assert a judicially cognizable interest on the state's behalf. *Hollingsworth*, 133 S. Ct. at 2662, 2663-64.

The only injury Appellants can claim is wholly speculative—i.e., when the General Assembly remediates the racial gerrymander in CD3, Appellants'

interests in Virginia's other congressional districts may suffer. Appellants Cantor and Wolf, obviously, no longer have any such interest. But the remaining Appellants have no stronger grounds to pursue this appeal. The possibility that a remedy would impair their interests is entirely speculative, and all the more so for those whose districts do not even border CD3. Indeed, the General Assembly is controlled by a Republican majority; it is just as probable that a remedy will be to Appellants' political advantage, rather than to their detriment.

The Court has found, under analogous circumstances, that voters who "do not live in the district that is the primary focus" in a racial gerrymandering case lack standing. *United States v. Hays*, 515 U.S. 737, 739 (1995). Applying this precedent, the court in *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995), found that congressional representatives who do not represent the challenged district "have no more than a generalized interest in [the] litigation, since . . . the possibility of a remedy that would impair their interests in their congressional seats is no more than speculative." This case is no different, and Appellants' attempt to invoke the Court's jurisdiction should be rejected.

II. RACE WAS THE PREDOMINANT FACTOR IN DRAWING CD3

In any event, on the merits, the appeal should be dismissed because the record below makes clear that race was the predominant factor in drawing CD3. Appellants take an ostrich-like approach to the record, which fully supports the Panel's determination that the drawing of CD3 was predominantly driven by race. Appellants gloss over—and sometimes affirmatively

misstate—the record, repeatedly characterizing as "undisputed" conclusions that are directly refuted by the evidence. *See, e.g.*, J.S. 8, 17-18.

Appellants' rehashing of disputed facts ignores the standard of review. The Court reviews the Panel's determination that race predominated in drawing CD 3 to determine whether it is "clearly erroneous." *Miller*, 515 U.S. at 917. Here, the finding that race predominated is not only supported by the record—it is compelled by it.

A. The Legislature's Redistricting Criteria

The General Assembly adopted redistricting criteria stating that the two most important criteria Del. Janis employed in drawing the Plan were (1) adhering to the one-person, one-vote mandate and (2) complying with federal law, and in particular the VRA's prohibition on "retrogression or dilution of racial or ethnic minority voting strength." Pl. Ex. 5 at 1. These criteria never once mention partisan performance. *See id.* Virginia's written redistricting criteria are similar to those adopted by Alabama, which also listed "compliance with federal law, and, in particular, the Voting Rights Act of 1965" as the second most-important criteria after adherence to one-person, one vote. *Alabama*, 135 S. Ct. at 1263; *see also id.* at 1267.

B. Del. Janis's Statements

Perhaps most glaring is Appellants' distortion of select statements of the Plan's sole author, Del. Janis, from which Appellants wildly extrapolate to claim that politics was the driving force behind CD3.[3] Appellants

[3] Appellants do not dispute that Del. Janis was the Plan's sole author and the most knowledgeable about its purpose. Del. Janis

claim that it is "undisputed" that Delegate Janis "repeatedly stated that protecting incumbents and perpetuating the 8-3 split were the Enacted Plan's goals." J.S. 18. In fact, he didn't.

Appellants' conclusion is directly contradicted by multiple explicit statements by Del. Janis that his primary purpose was to achieve a certain BVAP percentage in CD3 in perceived service of the VRA. When HB 5004, which would become the Enacted Plan, was up for its first vote in the House, Del. Janis explained that the two most important criteria he employed in drawing the Plan were adhering to one-person, one-vote and ensuring that CD3 had a certain racial composition, pointedly emphasizing that "there [should] be no retrogression in minority voter influence" in the district. Pl. Ex. 43 at 3; *see also* Pl. Ex. 13 at 9.

Del. Janis left no doubt about the predominant role of race in his decision-making. In his opening pronouncement about the Plan on the House floor, he stated that "one of the *paramount concerns* in . . . drafting . . . was the constitutional and federal law mandate under the [VRA] that we not retrogress minority voting influence in [CD3]." Pl. Ex. 43 at 10 (emphasis added). He emphasized the attention he had paid to race, explaining that he "was *most especially focused* on making sure that [CD3] did not retrogress in its minority voting influence," *id.* at 14 (emphasis added); that "the *primary focus* of how the

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explained that "this is my legislation." Pl. Ex. 43 at 14. The attorney for the House Republican Caucus remarked that Del. Janis was responsible for the Plan, describing him as "pretty Lone Ranger on this one." Pl. Ex. 53. As the Plan's sole author, Del. Janis's explanation of its purpose provides uniquely persuasive evidence that race predominated in drawing CD3.

lines in HB5004 were drawn was to ensure that there be no retrogression [of black voters] in [CD3]," *id.* (emphasis added); and that he considered this factor "nonnegotiable," *id.* at 25.

Del. Janis also explained what he meant by "retrogression." He simply looked at the BVAP numbers "to ensure that the new lines that were drawn for [CD3] would not retrogress in the sense that they would not have less percentage of [BVAP] under the proposed lines in 5004 than exist under the current lines." *Id.* at 10, 12-13; *see also* Pl. Ex. 13 at 8. In sum, Del. Janis repeatedly stated that his goal was to maintain a certain racial composition for CD3 and that he ensured that result by looking at racial data.

These are precisely the kinds of statements that the Court concluded in *Alabama* were "strong, perhaps overwhelming, evidence that race did predominate." *Alabama*, 135 S. Ct. at 1271 (describing how "the legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible").

In *Shaw II*, the Court "'fail[ed] to see how the District Court could have reached any conclusion other than that race was the predominant factor'" based largely on strikingly similar statements. 517 U.S. at 906 (quoting *Miller*, 515 U.S. at 918). North Carolina's Section 5 submission stated that the plan's "overriding purpose was to comply with the dictates of the Attorney General[] . . . and to create two congressional districts with effective black voting majorities." *Id.* "This admission was confirmed by . . . the plan's principal draftsman, who testified that creating two majority-black districts was the 'principal

reason' for Districts 1 and 12." *Id.* That the plan was driven by the perceived need to comply with the VRA did not mitigate the Court's conclusion that race was the predominant factor. *Id.* at 904-05 (laws classifying citizens primarily on the basis of race are constitutionally suspect, "whether or not the reason for the racial classification is benign [or] the purpose [is] remedial"); *Miller*, 500 U.S. at 918 (race was predominant purpose where "the General Assembly . . . was driven by its overriding desire to comply with [DOJ's] maximization demands").

In *Bush*, the Court relied on similar "substantial direct evidence of the legislature's racial motivations." 517 U.S. at 960. First, Texas's Section 5 submission stated that certain congressional districts "should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives." *Id.* (internal quotation marks and citation omitted). Second, the litigants conceded that the districts "were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives." *Id.* at 961 (internal quotation marks and citation omitted). Finally, legislators testified that the decision to draw majority-minority districts "was made at the outset of the process and never seriously questioned." *Id.* In those cases, as here, race predominated.

But the record evidence here is even stronger. Del. Janis not only stated that he prioritized race, he also expressly disavowed any consideration of partisan performance. When asked whether he had "any knowledge as to how this plan improves the partisan performance of those incumbents in their own district[s]," Del. Janis answered unequivocally: "I haven't looked at the partisan performance. It was not

one of the factors that I considered in the drawing of the district." Int.-Def. Ex. 9 at 14. This is consistent with his description of his redistricting criteria, which never once mention partisan performance. *See* Pl. Ex. 43 at 3-7, 18-20.

The Panel found it "appropriate to accept the explanation of the legislation's author as to its purpose." J.S. 23a. Appellants do not, suggesting implicitly that Del. Janis was being duplicitous when he disavowed a political purpose, claiming that his "overriding objective" was, in fact, to advance partisan objectives. J.S. 20. The record does not begin to support this assertion.

Appellants first point to the legislative record to contend that Del. Janis's "overriding objective was 'to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election,' when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008)." *Id.* The term "overriding objective" is Appellants' own creation and is not found in the legislative record. The record instead reveals that "respect[ing] . . . the will of the Virginia electorate" came "[t]hird" among Del. Janis's redistricting considerations, after population equality and non-retrogression. Pl. Ex. 43 at 3-4; *see also id.* at 19 ("[T]he third criteria that we tried to apply was, to the greatest degree possible, we tried to respect the will of the Virginia electorate as it was expressed in the November 2010 congressional elections."). While Appellants tout this statement as "a display of candor rarely seen among legislators engaging in redistricting," J.S. 20, their own distortions are all the more conspicuous. To the extent this statement reflects a partisan motive, the fact that the Plan's author

explicitly subordinated it to race definitively *disproves* that politics predominated the redistricting process.

Also absent from the record is any reference to the 8-3 partisan split Appellants contend drove the Plan. Del. Janis spelled out precisely how he applied the "will of the Virginia electorate": "[W]hat that meant was we based the territory of each of these districts on the core of the existing congressional districts" in an attempt to make a "minimal amount of change or disruption to the current boundary lines." Pl. Ex. 43 at 4, 19. Indeed, because the "current boundary lines" were the same in 2008 and 2010, when they generated different partisan divides, Appellants' suggestion that Del. Janis sought to achieve a certain partisan balance falls flat. Moreover, as discussed *infra*, the Plan's removal of over 180,000 people from their existing districts to increase the population of CD3 by 63,976, Tr. 87:7-17, only demonstrates that, as promised, Del. Janis's interest in core preservation gave way to his concerted effort to maintain a specific racial composition in CD3.

Extrapolating from Del. Janis's statement that "[w]e respected the will of the electorate by not placing . . . two congressmen in a district together" and by not "draw[ing] a congressman out of his existing district," Pl. Ex. 43 at 19-20, Appellants contend that the map drawer sought to maintain Republican advantage and boost Republican performance. But Del. Janis was precise in his statement of intent: although he sought to avoid pitting incumbents against one another, this goal, too, was taken into account only after he established a certain racial composition in CD3. Taken together, Del. Janis's statements support only one conclusion: partisan performance was disavowed

as a factor altogether, and even if politics was considered, it was decidedly secondary to race.

In the face of these unambiguous statements, Appellants inexplicably contend that incumbent congressmen "effectively drew their own districts." J.S. 22. This assertion contradicts both Del. Janis's testimony and Appellants' own assertions on the record. Del. Janis clearly stated that he spoke with congressmen only to seek their input about communities of interest. Pl. Ex. 43 at 20 ("[W]e also tried not to split local communities of interest based on the recommendations we received from the current members of the congressional delegation."); *id.* at 26 ("[W]hen looking for input as to how to best preserve local communities of interest . . . it was relevant and it was reasonable to seek input and recommendations from those current congressmen."); Int.-Def. Ex. 9 at 8 ("We tried to get input from them as to how best to draw the boundaries in order to preserve the local communities of interest within their district."). Del. Janis never even implied, much less stated, that congressmen drew their own districts.

In fact, Del. Janis considered "the permissive criteria [] based on recommendations received from each of the 11 currently elected congressmen, both Republican and Democrat, about how best to preserve local communities of interest" only after considering the "mandatory" criterion of non-retrogression. Pl. Ex. 43 at 19, 22-23.

Appellants' discovery responses, moreover, confirmed that their contributions to the Plan were minimal at best. The four congressmen who represented the districts surrounding CD3, and who would have benefitted most from packing black voters into CD3 under Appellants' theory, had almost no input on

Del. Janis's map. Rep. Wittman (CD1) never spoke to Del. Janis about redistricting, attended only one meeting about redistricting, which Del. Janis did not attend, and had no draft maps or redistricting-related communications in his possession. Pl. Ex. 39. Rep. Forbes (CD4) did not provide any feedback on the Enacted Plan, attended no meetings related to redistricting, and had no draft maps or communications with the General Assembly about redistricting. Pl. Ex. 34. Rep. Rigell (CD2) and Rep. Cantor (CD7) similarly attested that they had little to no input on the Enacted Plan. Pl. Exs. 33, 38. Appellants can hardly disclaim involvement during discovery and then proclaim usurpation of the redistricting process on appeal.

Remarkably, Appellants assert that it is "undisputed" that the Enacted Plan was motivated by politics and incumbency protection, and that there is no evidence suggesting that race was predominant." J.S. 17-18. The record demonstrates precisely the opposite. Del. Janis could not have been clearer in his prioritization of race over all other criteria. Appellants cannot establish it was "clear error" to conclude that the race was the predominant purpose behind CD3.[4]

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[4] Appellants rely extensively on the statements of "contemporaneous commentators" to the redistricting process, J.S. 21, including an article written by Appellees' expert prior to his engagement in this case and statements by the Plan's opponents. Appellants cannot seriously argue that "commentaries" trump the unequivocal statements of the Plan's sole author. To find otherwise would suggest that the Court look to, for example, news stories "commenting" on legislation, instead of the legislative record, as evidence of legislative intent.

C. BVAP Threshold

In addition to Del. Janis's repeated statements that racial considerations predominated above all others, the Panel found it highly persuasive that the General Assembly used a "[r]acial [t]hreshold [a]s the [m]eans to [a]chieve Section 5 [c]ompliance," J.S. App. 20a, and for good reason: It was the fact that the legislature in *Alabama* used a mechanical racial threshold that led the Court to conclude that the record there presented "strong, perhaps overwhelming, evidence that race did predominate." *Alabama*, 135 S. Ct. at 1271.

Alabama is just the most recent case in a long line of cases in which the Court has treated "rigid racial quota[s]" with the highest skepticism. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). Thus, districts that are "unexplainable on grounds other than the racial quotas established for those districts . . . are the product of presumptively unconstitutional racial gerrymandering." *Bush*, 517 U.S. at 976 (internal quotation marks, alteration, and citation omitted).

The Panel's conclusion that the General Assembly applied a racial threshold in creating CD3 was consistent not only with the legislative record and Virginia's Section 5 submission but also with Appellants' own expert analysis in this case.

First, when the General Assembly considered the Plan, Senator Jill Vogel argued that a 55% BVAP floor was necessary to comply with Section 5: "[W]hen it came to Section 5—I just want to be very clear about this—that we believed that that was not really a question that was subject to debate. The lowest amount of African Americans in any district that has

been precleared by [DOJ] is 55.0." Int.-Def. Ex. 32 at 18. She further explained, "[w]e were just simply following what, I believe, is not subject to any question; that . . . the lowest percentage that [DOJ] has ever approved is 55.0." *Id.* at 20.[5] Indeed, when Del. Janis was questioned whether he had "any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50," or whether the 55% threshold was "just a number that has been pulled out of thin air," Del. Janis justified the use of a 55% BVAP floor as "weighing a certainty against an uncertainty." Pl. Ex. 45 at 7.

Second, Virginia's Section 5 submission consistently and explicitly uses a 55% BVAP threshold to explain the Plan's impact on racial minorities. Describing the BVAP increase in CD3, the submission states that "both total and voting age populations are increased to over 55 percent." Pl. Ex. 6 at 2. It repeats this threshold number *three more times*, once for each of the legislature's other proposed plans. *Id.* at 3, 4.

Third, Appellants' own expert explained that the General Assembly adopted a 55% BVAP floor in a misguided attempt to avoid Section 5 liability. Mr. Morgan wrote that the General Assembly "found [the 55% BVAP floor] appropriate to comply with Section 5 for House [majority-minority] Districts." Int.-Def. Ex. 13 at 26-27. He found that "the General Assembly . . . had ample reason to believe that legislators of both parties, including black legislators, viewed the 55% black VAP . . . as appropriate to obtain

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[5] As explained *infra*, in fact DOJ has frequently precleared districts with a BVAP below 55%, including prior versions of CD3 and all majority-minority districts in Virginia's 2011 senate plan.

Section 5 preclearance, even if it meant raising the Black VAP above the levels in the benchmark plan." *Id.* The General Assembly then "acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the [CD3] Black VAP at 56.3%." *Id.* at 27; *see also* Tr. 351:20-352:19.

Appellants do not attempt to challenge the Panel's factual finding that the General Assembly adopted and implemented a mechanical 55% BVAP threshold to draw CD3. But while their appellate strategy is to relegate the use of a racial threshold to a footnote, J.S. 23 n.1, Appellants *embraced* these legislative facts and Mr. Morgan's conclusions in their trial brief. *See* Def. Tr. Br. 26 (arguing "the General Assembly had 'a strong basis in evidence' to believe that Section 5 prohibited reducing [CD3's] BVAP below the benchmark level, and that 55% BVAP was a reasonable level for preserving the ability to elect," and it "acted accordingly when it adopted the Enacted Plan with 56.3% BVAP in [CD3]"). Appellants also quoted the legislative record showing that delegates demanded a 55% threshold. *Id.* at 25-26 (Del. Dance "advocated a 55% minimum BVAP for majority-black districts," stating in a public hearing "'at least 55 percent performing' was necessary to preserve black voters' ability to elect in House districts") (quoting Int.-Def. Ex. 30 at 13). And even after trial, Appellants argued that "[t]he General Assembly . . . had evidence that 55% BVAP was a reasonable threshold for obtaining . . . Section 5 preclearance," advancing the same evidence in support of such a threshold. Def. Post-Tr. Br. 32.

Of course, Appellants are fleeing their prior embrace of the 55% BVAP threshold because *Alabama* unequivocally rejected mechanical racial thresholds

unsupported by analysis. Here, *no one* conducted an analysis of racial voting patterns to determine the number of black voters needed to preserve their voting strength in CD3. Tr. 98:16-99:21, 328:10-12, 354:18-23; Pl. Ex. 42, 43 at 15. The General Assembly's single-minded adherence to a racial threshold, adopted without any basis whatsoever in fact, not only establishes that race was the Plan's predominant purpose but also negates any argument that Appellants could satisfy strict scrutiny.

The General Assembly's use of a mechanical 55% BVAP threshold provides unequivocal evidence supporting the Panel's conclusion that race predominated.

D. Traditional Redistricting Principles

As set out above, this was a direct evidence case. There is no need to look to *circumstantial* evidence to confirm what Del. Janis stated expressly about his motives. Nonetheless, the circumstantial evidence fully supports the conclusion that the General Assembly subordinated traditional redistricting criteria, such as compactness, contiguity, and respect for political subdivisions, to racial considerations in crafting CD3.

The focus on race is evident in CD3's shape. "[R]eapportionment is one area in which appearances do matter," *Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("*Shaw I*"), and a district's "bizarre" or "irregular" shape provides circumstantial evidence that racial considerations predominated, *see Miller*, 515 U.S. at 914. Districts that connect disparate communities by narrowly complying with contiguity requirements are often probative of a racial purpose. *See id.* at 917 (race predominated where narrow land bridges connected areas with high concentrations of black residents);

Shaw II, 517 U.S. at 903, 905-06 (race predominated where district snaked along freeway collecting areas with black residents); *Moon*, 952 F. Supp. at 1147 (race predominated in predecessor CD3 that had bizarre shape).

By every measure used in Virginia's Section 5 submission, CD3 is Virginia's least compact district. Pl. Ex. 27 at 7; Pl. Ex. 4 at 10; Tr. 375:3-24. *See Shaw II*, 517 U.S. at 905-06 (race predominated where district's shape was "highly irregular and geographically non-compact"). This is no surprise given Del. Janis's admission that he did not consider compactness when drawing CD3. Pl. Ex. 14 at 8.

Appellants hardly dispute the objective flaws in CD3's shape. Instead, they contend that these flaws were inherited from the Benchmark district, "whose compactness had *never* been challenged." J.S. 30. But the lack of a judicial challenge to the Benchmark district hardly exonerates CD3. Even if Benchmark CD3 *had* received a judicial seal of approval, it would have little bearing on a challenge to the current district. Enacted CD3 exacerbated the district's problems in ways that echo the version deemed unconstitutional in *Moon*, for instance, by engulfing Petersburg and further splitting Norfolk. Appellants' attempt to dismiss the relevance of CD3's non-compact shape by asserting that there is no "professional standard" for judging compactness, J.S. 30, would undermine both the Court's precedent, *Shaw I*, 509 U.S. at 647, and the requirements of the Virginia Constitution, Va. Const. art. II, § 6 ("Every electoral district shall be composed of contiguous and compact territory.").

CD3 also stretches the limits of contiguity. Although the Panel found CD3 "legally contiguous" because Virginia law allows waterways to connect

parts of districts, it recognized that CD3's tenuous use of water contiguity to "bypass white communities and connect predominantly African-American populations . . . contributes to the overall conclusion that the district's boundaries were drawn with a focus on race." J.S. App. 25a-26a. Adherence to the letter of the law is of no moment where manipulation of the contiguity requirement provides further evidence of the racial motivation behind CD3.

CD3 also splits more counties and cities—nine splits in all—than any other district and contributes to most of the splits of its neighboring districts. The district with the second-highest number is CD1, with only five splits, two of which are due to CD1's boundary with CD3. Pl. Ex. 27 at 8-9; Tr. 76:10-79:3. CD3 also splits more voting tabulation districts ("VTDs") than any other district. Tr. 78:17-19. The Plan splits 20 VTDs in all, of which CD3 participates in 14. Pl. Ex. 27 at 8-9. The General Assembly used these splits "strategically" as a means of bypassing white population centers to sweep more black communities into CD3. *See* J.S. App. 27a.

Appellants' contention that protecting district cores explains CD3's composition grossly inflates the role of core preservation. As noted, Del. Janis rank-ordered core preservation third after racial composition; indeed, the allegedly "preferred" principle of core preservation appears nowhere in the Senate Criteria that Appellants previously argued provides "a preexisting 'framework' against which to judge the Enacted Plan." Def. Tr. Br. 18. To the extent the General Assembly considered district cores, it did little to respect them. CD3, for example, needed 63,976 additional residents to meet the ideal population, but instead of just adding people, the General Assembly first removed 58,782

residents from CD3. Tr. 80:22-81:12. Indeed, the General Assembly removed over 180,000 people from their existing districts simply to increase the population of CD3 by 63,976. Tr. 87:7-17. This massive dissection of district populations, largely removing white voters so that black voters could be added to CD3, demonstrates that preserving cores hardly trumped race as a consideration.

E. Racial Sorting of VTDs

The Panel was further persuaded that race predominated based on undisputed evidence provided by Appellees' expert Dr. McDonald that, among the high-performing Democratic VTDs that could have been placed within CD3, the General Assembly chose to include those with significantly higher BVAPs. J.S. App. 30a. Appellants mischaracterize Dr. McDonald's testimony, asserting that he "conceded" politics predominated and that his VTD analysis "reveals a *political* pattern no different from [the] *racial* pattern." J.S. 32.

But Dr. McDonald most assuredly never testified that politics predominated. His "concession" that packing black residents into CD3 helped Republicans is hardly noteworthy and in fact reveals a fundamental flaw in Appellants' legal theory. Just because a districting plan benefits a certain group does not mean the plan was drawn primarily for that purpose. Indeed, Appellants' expert made the equivalent "concession" that the Plan's impact was consistent with race as the predominant factor behind CD3. Tr. at 357.

Based on all of the evidence, Dr. McDonald concluded that race, and *not* politics, explains CD3. In particular, he analyzed VTDs in CD3 and adjacent

localities that were strongly Democratic and showed that VTDs with higher BVAPs were included in CD3, while VTDs with lower BVAPs were not. Pl. Ex. 28 at 6-7; Tr. 87:18-89:23, 397:13-403:13. Dr. McDonald found that the difference in BVAP between those high-performing Democratic VTDs dropped from CD3 and those included in CD3 (36 percentage points) was much larger than the difference in Democratic performance (only 19.2 percentage points). Tr. 373:8-10; Int.-Def. Ex. 50; Pl. Ex. 57. Appellants' assertion that the political effect of the VTD swaps is identical to their racial effect is not accurate. The Panel's factual determination that the General Assembly disproportionately moved high-BVAP VTDs *into* CD 3 and l[illegible]ely white VTDs *out* of CD3 is not "clear error."

III. THE PANEL PROPERLY APPLIED THE PREDOMINANCE INQUIRY

To distract from the overwhelming evidence that race predominated in drawing CD3, Appellants conjure a legal error, arguing that the Panel failed to properly apply *Easley v. Cromartie*, 532 U.S. 234 (2001). J.S. 8, 24. Appellants misunderstand *Easley* and propose a new standard that would require the Court to disregard entirely the mountain of evidence of race-based redistricting established above. Unlike in *Easley*, the evidence here leads to only one conclusion—race predominated over politics.

A. The Panel Found that Race Predominated over Politics

Appellants claim the Panel "fail[ed] to make the required finding . . . that race rather than politics predominated in District 3." J.S. i. This hardly

warrants a response. The opinion stated in no uncertain terms: "Plaintiffs have shown race predominated." J.S. App. 14a; *see also id.* at 36a ([R]ace predominated when the legislature devised Virginia's Third Congressional District"); *id.* at 43a ("Plaintiffs have shown that race predominated[.]"). The opinion repeats the same conclusion in multiple ways. For instance, in "conclud[ing] that compliance with Section 5 of the VRA . . ., and accordingly, race, 'was the [legislature's] predominant purpose,'" *id.* at 19a, the opinion cites Appellants' concession to that effect. It credits Del. Janis's explicit statements of race as the predominant purpose. *Id.* at 20a. And it further examines the host of circumstantial evidence to support "the overall conclusion that the district's boundaries were drawn with a focus on race." *Id.* at 26a.

Indeed, the opinion devotes an entire section to its conclusion regarding the "Predominance of Race over Politics." *Id.* at 30a. It specifically finds that Appellants' "post-hoc political justifications" have no support in the direct or circumstantial evidence. *Id.* at 29a. It concludes that the "explicit and repeated admissions of the predominance of race . . . when taken together with the circumstantial evidence of record, compel our conclusion that race was the legislature's paramount concern." *Id.* at 36a (internal quotation marks and citation omitted).

Appellants' curious suggestion that the Panel's finding that "race predominated" does not mean that the Court found that "race predominated" is creative, but it defies both the plain language of the opinion and common sense.

B. *Easley's* Circumstantial Evidence Requirement Is Inapplicable

Hoping to divert the Court's attention from the record evidence, Appellants attempt to put Appellees' alternative map on trial. Appellants would have the Court believe that every racial gerrymandering claim rises and falls on the plaintiffs' alternative plan, regardless of any other evidence of racial purpose. Specifically, Appellants contend that, under *Easley*, racial gerrymandering plaintiffs must proffer an alternative plan that "achieves the General Assembly's political goals," J.S. i-ii, which, in this case, Appellants allege followed "a clear 8-3 incumbency protection purpose," *id.* at 25. As explained *supra*, Appellants' contention that the Plan was drawn to create an 8-3 distribution is pure fiction: The legislative map drawer expressly *disavowed* such objectives.

The Court's precedent is clear that the fact-finder is not required to consider only circumstantial evidence in racial gerrymandering cases. "The plaintiff's burden in a racial gerrymandering case is 'to show, *either* through circumstantial evidence of a district's shape and demographics *or* more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Alabama*, 135 S. Ct. at 1267 (quoting *Miller*, 515 U.S. at 916) (emphasis added).

Appellants' reliance on *Easley* is misplaced. In *Easley*, there was little direct evidence of racial motive, requiring the parties and the court to make their arguments and findings based on circumstantial evidence. In finding that race predominated, the

Easley district court relied primarily on expert analysis based on voter registration, the "unreliable" testimony of the defendants' expert, a legislator's "allu[sion] at the time of redistricting to a need for 'racial and partisan' balance," and an email reporting that a senator had "moved Greensboro Black community into the 12th." 532 U.S. at 241 (internal quotation marks and citation omitted). The Court reversed, holding that, on the largely circumstantial record, the plaintiffs had "not successfully shown that race, rather than politics, predominantly accounts for" the resulting map. *Id.* at 257. While the Court found that one email offered some "'direct' evidence" in support of the lower court's conclusion, it found it "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases." *Id.* at 254. That kind of direct evidence is discussed at length *supra* and is precisely the type of evidence upon which the Panel in this case relied.

In other words, this case is plainly distinguishable from *Easley*, in which the Court concluded its analysis by stating that "*[i]n a case such as this one*," plaintiffs "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Id.* at 258 (emphasis added). Appellants read far too much into this passage, suggesting that it renders moot the previous twenty pages of the opinion. Such a reading is untenable. *Easley*'s approach applies where the legislature disavows racial motives and the Court must rely on circumstantial evidence to divine whether racial or political objectives truly drove redistricting. Where the *Easley* plaintiffs had presented little to no direct evidence that race was the

predominant factor, the Court accordingly required an alternative plan as additional circumstantial proof.

Here, by contrast, Appellees presented unequivocal statements of the Plan's sole map drawer that race predominated over politics, together with a wealth of supporting evidence. Where the map drawer has unambiguously *rank-ordered* his redistricting criteria, expressly prioritizing CD3's racial composition over core preservation and incumbency protection, and *disavowed* consideration of political performance, no alternative map is required to retroactively disentangle racial and political motives. In light of the direct evidence available here, *Easley*'s circumstantial evidence requirement does not apply.

The Panel properly found as much, noting that compared to *Easley*, which included "overwhelming evidence in the record 'articulat[ing] a legitimate political explanation for [the state's] districting decision,'" Appellants' "post-hoc political justifications for the 2012 Plan in their briefs" hardly stacked up against the abundance of direct and circumstantial evidence of race as the predominant purpose. J.S. App. 33a (quoting *Easley*, 532 U.S. at 242). As Appellants admit, as "strangers to the redistricting process," their assertions about legislative motives "are plainly irrelevant." J.S. 24 n.1.

Thus, *Easley* does not do away with the long-established rule, recently affirmed in *Alabama*, that a plaintiff's burden can be established through direct evidence nor does it require the Court to close its eyes to the mapdrawer's express admissions of race-based redistricting for lack of an alternative plan.

C. Appellees' Alternative Plan Further Shows that Race Predominated

Although not required by *Easley*, Appellees did submit an Alternative Plan as additional circumstantial evidence that the General Assembly could have better achieved its stated redistricting criteria while creating significantly greater racial balance. The Alternative Plan made minimal changes to district boundaries, leaving the vast majority of the map unaffected out of respect for the General Assembly. Like the Enacted Plan, the Alternative Plan creates eleven equal-population congressional districts, and Alternative CD3 preserves black voters' ability to elect candidates of their choice. Pl. Ex. 29 at 5; Pl. Ex. 30 at 4-6; Tr. 114:23-115:1. Alternative CD3 is more compact than Enacted CD3. Tr. 73:15-25, 347:13-348:18, 373:17-376:13. It also connects by land areas that had previously been connected only by water. Finally, the Alternative Plan splits fewer localities and decreases the number of residents affected by the splits by 240,080. Pl. Ex. 29 at 3-5. Thus, the Alternative Plan adheres to Virginia's traditional districting criteria of equal population, compactness, contiguity, and respect for local political boundaries better than the Enacted Plan.

Appellants contend that the Alternative Plan's preservation of district cores is worse than the Enacted Plan's. But, as explained above, preserving district cores was at best a low priority when drawing the Enacted Plan, and the Alternative Plan compares favorably to the Enacted Plan on this criterion. For instance, 69.2% of Alternative CD3's residents also lived in Benchmark CD3, and this percentage is consistent with the general range of core preservation established by the Enacted Plan (71.2% to 96.2%).

Int.-Def. Ex. 13 at 24. Indeed, because the Alternative Plan primarily sought to change as few districts as possible, it did not change the Enacted Plan's approach to core protection for nine out of eleven districts. *Id.* On average, 84.5% percent of the residents in each district lived in the same district under the Benchmark Plan, only 1.5% less than—and "comparably consistent with"—the Enacted Plan. *Id.*; *Easley*, 532 U.S. at 258.

The Alternative Plan also creates significantly greater racial balance than the Enacted Plan. Tr. 116:1-117:5. As Appellants' expert explained, "significantly greater racial balance" could be defined as "a more even distribution of racial groups across districts" or "a more even distribution of racial groups within a district." Tr. 385:7-386:9. By those measures, the Alternative Plan, which includes a CD3 BVAP of 50.2%, has significantly greater racial balance than the Enacted Plan. Because there are fewer black and more white voters in Alternative CD3 than Enacted CD3, and because the Alternative Plan adds black voters to Alternative CD2, the Alternative Plan makes the percentages of black and white voters within and among the districts more balanced. Tr. 116:1-117:5.

Appellants contend that the Alternative Plan does not serve the same political goals as the Enacted Plan. But, as explained above, the Plan's drafter did not consider partisan performance. Appellants cannot invent a post-hoc partisan justification for the Enacted Plan and then fault Appellees for not adhering to their imagined goals of the actual map drawer. To the extent it was a goal to avoid drawing incumbents into the same district, the Alternative Plan does not do so. Tr. 112:12-14.

In sum, the Alternative Plan offers further proof that Virginia could have improved the racial balance of the Plan by relying primarily on legitimate districting criteria articulated by the General Assembly rather than racial factors.

IV. THE PANEL PROPERLY APPLIED STRICT SCRUTINY

Appellants' brief and half-hearted argument that the Panel misapplied the narrow tailoring requirement is baseless. Again Appellants misconstrue the record, arguing that the Panel applied a "least-restrictive-means test," J.S. 36, when those words appear nowhere in the opinion. Instead, the Panel expressly applied the test as articulated in *Alabama*—whether the General Assembly had "'a strong basis in evidence in support of' its use of race." J.S. 36a-37a (quoting *Alabama*, 135 S. Ct. at 1274).

The Panel found that the defendants had failed to show that there was any basis—much less a "strong" basis—for concluding that use of a 55% BVAP threshold and augmentation of CD3's BVAP was required to avoid retrogression. J.S. App. 39a-40a. Instead, the General Assembly went astray because—like in *Alabama*—the General Assembly "relied heavily on a mechanically numerical view as to what counts as forbidden retrogression without a 'strong basis in evidence' for doing so." J.S. 39a-40a.

Again, Appellants do not truly contest that the General Assembly used a 55% BVAP threshold. They further conceded that the General Assembly performed *no analysis* of whether avoiding retrogression required use of a 55% BVAP threshold (or augmentation of the BVAP of CD3 to 56.3%). *See* J.S. 37. The General Assembly did not perform any "'functional

analysis of the electoral behavior within'" CD3. *Alabama*, 135 S. Ct. at 1272 (quoting Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011)).

Nonetheless, Appellants argue that increasing the BVAP to 55% or higher was necessary to obtain DOJ preclearance. J.S. 34. This contention is simply wrong.[6] To support it, Appellants construct a counterfactual world, hypothesizing about how DOJ would have responded if Virginia had decreased the BVAP of CD3 to less than 30%. J.S. 37. But not only does this fail to explain why the General Assembly's decision to *increase* the BVAP of CD3 to over 55% was narrowly tailored—a question on which defendants bore the burden below—it ignores Virginian history, where DOJ previously twice precleared CD3 with BVAPs lower than 55% and, most recently, precleared the State's 2011 senate plan, in which all five majority-minority districts were below this threshold. Pl. Exs. 20, 22, 30. This record provides no basis in evidence whatsoever for believing that Section 5 required a 55% BVAP floor.

Appellants cannot demonstrate a strong basis in evidence for the use of race. So instead, they effectively ask the Court to do away with the narrow tailoring requirement entirely and to permit legislatures to engage in racial gerrymandering with impunity, based on uninformed and unsupported

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[6] Indeed this Court, in *Alabama*, relied on DOJ's own articulation of the proper Section 5 analysis in reiterating that "Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan" but rather is "satisfied if minority voters retain the ability to elect their preferred candidates." 135 S. Ct. at 1273 (citing Brief for United States as Amicus Curiae 22).

assertions that packing minority voters into an existing majority-minority district is necessary to comply with the VRA. Appellants complain that the Panel placed the General Assembly in a "racial straightjacket." J.S. 36. Far from it. The Panel did not require justification of CD3's BVAP down to the last decimal. It held Appellants to their burden on strict scrutiny of pointing to specific and substantial evidence justifying the General Assembly's unabashedly race-based approach—and they could not do so and hardly tried. Strict scrutiny is not, as Appellants would have it, a shapeless and flabby standard of review that allows the government to justify the use of race by invoking the VRA talismanically without any analysis or evidence.

Because the General Assembly failed to "t[ake] any steps" to narrowly tailor its use of race in drawing the district, *Moon*, 952 F. Supp. at 1150, its predominant use of race cannot satisfy strict scrutiny.

CONCLUSION

Appellees respectfully submit that the appeal should be dismissed for lack of jurisdiction because Appellants lack standing to pursue it. In the alternative, the judgment of the three-judge panel should be summarily affirmed.

Respectfully submitted,

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No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM 1

I. APPELLEES FAIL TO REHABILITATE THE MAJORITY'S MISAPPLICATION OF *EASLEY* AND *ALABAMA* 4

II. APPELLEES FAIL TO REHABILITATE THE NARROW TAILORING ERRORS 10

III. APPELLANTS HAVE STANDING 11

III. CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Ala. Leg. Black Caucus v. Ala.,
135 S. Ct. 1257 (2015) 1, 4, 10, 11

Bush v. Vera,
517 U.S. 952 (1996) 9

Cantor v. Personhuballah,
135 S. Ct. 1699 (2015) 3

Easley v. Cromartie,
532 U.S. 234 (2001) ..... *passim*

Hall v. Virginia,
276 F. Supp. 2d 528 (E.D. Va. 2003) 11

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 11, 12

In re Primus,
436 U.S. 412 (1978) 4

Johnson v. Mortham,
915 F. Supp. 1529 (N.D. Fla. 1995) 12, 13

King v. Ill. State Bd. of Elections,
410 F.3d 404 (7th Cir. 2005) 11, 12

Meese v. Keene,
481 U.S. 465 (1987) 12

Shaw v. Hunt,
517 U.S. 899 (1996) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Hays,
515 U.S. 737 (1996) 12

Wright v. Rockefeller,
376 U.S. 52 (1964) 11

STATUTES

Voting Rights Act § 5 ..... *passim*

BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM

Appellees' Motions confirm that the Court should note probable jurisdiction or summarily reverse because they do not even attempt to respond to Appellants' demonstration of the majority's legal errors. Appellants' principal argument is that the majority committed basic legal error because it never found any inconsistency between the alleged racial purpose and the neutral factors of "partisan politics" and "protect[ing] incumbents" that "inarguably" "played a role" in drawing District 3 in this "mixed motive" case. J.S. App. 30a-31a. This is error because it is impossible for race to "subordinate" those neutral factors, or have a "direct and significant impact" on District 3's shape, absent such an inconsistency between racial and neutral factors. *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1266-71 (2015). And, absent such an inconsistency, it is irrelevant that the legislature ranked Section 5's "mandatory" "racial" purpose higher than the "voluntary" neutral factors, because Section 5 and the neutral factors were coextensive and there was thus no occasion to choose between them. Therefore, the majority clearly violated the command of *Shaw* (and *Easley* and *Alabama*) by finding a Fourteenth Amendment violation without identifying such an inconsistency. *See id.*; J.S. 8-24.

In response, neither Appellee even hints at any potential inconsistency between race and politics or incumbency protection, thus confirming that it was impossible for "race *rather than* politics" to cause District 3's shape, since race and politics pointed in precisely the same direction. *Easley v. Cromartie*,

532 U.S. 234, 243 (2001). Moreover, Appellees simply echo the majority's erroneous notion that race "predominated" because Section 5's "mandatory" requirement ranked higher than "voluntary" neutral principles, without attempting to explain (1) how such rank-ordering could possibly "significantly affect" District 3's shape by "subordinating" neutral principles, when the lower-ranked voluntary factors are wholly coextensive with the "racial" requirements of the Voting Rights Act ("VRA") or (2) how such rank-ordering analysis would not *automatically* establish racial "predominance" in *every* case, since the mandatory federal VRA requirements *always* rank higher than voluntary neutral state principles. J.S. 8-24.

Apparently recognizing these fatal deficiencies, Appellees seek to rewrite the majority opinion as somehow embracing the extraordinarily counter-intuitive and historically unprecedented notion that Virginia's Republican legislature eschewed *any* consideration of politics or protecting Republican incumbents. Pl. Mot. 24-25; Def. Mot. 36-37. But this facially "remarkable" assertion is at war with the majority's express finding that politics and incumbency protection were "inarguably" "motives" for District 3's shape, so Appellees' revisionist theory cannot provide a basis for affirming the *majority's* contrary conclusions. Rather, summary affirmance would affirm a rule that race subordinates traditional principles even when subordination is impossible because race is coextensive with the neutral principles that "inarguably" "motivated" the legislature, solely because the legislature acknowledged the truism that the federal VRA is

"mandatory." Any such rule, however, impermissibly converts *Shaw* from a prohibition against using race in a way that changes a district by "subordinating" neutral principles into a prohibition against *considering* the race-conscious requirements of the VRA, even when they have no effect because they mimic coextensive neutral principles. Such a rule would also at least presumptively invalidate *all* redistricting because, to quote Plaintiffs-Appellees, this Court has "acknowledged" that "redistricting almost always involves racial considerations." Pl. Mot. 30, *Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015). Finally, this rule would perversely prohibit majority-minority districts from being drawn pursuant to the neutral principles driving all majority-white districts, because the higher-ranked, mandatory VRA requirements purportedly invalidate application of the coextensive neutral principles.

Relatedly, the majority erred by relieving Plaintiffs of the *Easley* burden to prove racial subordination by producing an alternative plan where race does not predominate but that equally achieves the Legislature's districting and political goals. J.S. 24-31. Again, Appellees nowhere dispute that Plaintiffs' Alternative flunks this test because it is concededly "significantly" worse at preserving District 3's core and disserves Republican political interests by converting 50/50 District 2 into a "heavily Democratic" district. Tr. 119, 152-53, 422-23.

Plaintiffs seek to excuse this basic failure by arguing that they need not satisfy *Easley* where, as purportedly occurred here, the Legislature does not *say* politics was more important than the VRA. But this contradicts *Easley*'s plain language and

Defendants-Appellees' admission that *Easley* applies where "'the State argues that politics, not race, was its predominant motive.'" Def. Mot. 39 (quoting *Ala.*, 135 S. Ct. at 1267). This is such a case. Post-Trial Br. (DE 106).

Thus, notwithstanding Appellees' strained contrary arguments, this is not a case where the majority merely engaged in clearly erroneous fact-finding (although it did do that and, as *Easley* demonstrates, such clear errors warrant plenary review, 532 U.S. at 242-58). Rather, the majority fundamentally altered *Shaw*, *Easley* and *Alabama*'s requirement that plaintiffs prove the district was "changed" through "subordination" of neutral principles into a prohibition against the *consideration* of race *necessitated* by the VRA, even where such considerations have no effect. At a minimum, whether *Shaw* and its progeny should be so revised/reinterpreted is a "substantial question" foreclosing summary affirmance. *In re Primus*, 436 U.S. 412, 414 (1978).

I. APPELLEES FAIL TO REHABILITATE THE MAJORITY'S MISAPPLICATION OF *EASLEY* AND *ALABAMA*

Like the majority, Plaintiffs invoke Delegate Janis's routine, accurate statements that Section 5 required the Legislature to "avoid retrogression in District 3" and that this *federal mandate* took precedence over *voluntary state* principles (or politics). Pl. Mot. 9-16. Even if these statements were an admission that preserving District 3's BVAP was of utmost importance (*but see* p.9, *infra*), that is immaterial because there is no conflict between Section 5's re-

quirement to preserve District 3 and the Legislature's general policy of preserving *all* districts for core-preservation, incumbency protection and political purposes. Since there is no *conflict*, race cannot *predominate*.

Appellees nowhere dispute that politics and core/incumbency preservation were coextensive with Section 5's non-retrogression command or that all majority-white districts not subject to Section 5 were preserved in the same way as District 3. This conclusively demonstrates that Section 5 was not even the "but-for" reason for preserving District 3.

More specifically, Appellees nowhere contend that adhering to the alleged BVAP "floor"—whether the Benchmark 53.1% or 55%—was inconsistent with Republican political interests or core preservation. Plaintiffs acknowledge that the Legislature "rank ordered core preservation" *first* among discretionary state policies and do not dispute that Enacted District 3 performs "significantly" better on that factor than any alternative. Pl. Mot. 22. Indeed, Plaintiffs agree that Janis sought to preserve the "will of the Virginia electorate" expressed in the 2010 elections by preserving, with "minimal" changes, the "core of the existing congressional districts" that produced an 8-3 Republican delegation. *Id.* 14. Since it is undisputed that Enacted District 3 *better* served the concededly paramount neutral factors of preserving cores and Republican incumbents than *any* alternative, its 56.3% BVAP could not possibly have *subordinated* these factors.

Plaintiffs' own arguments reinforce that District 3 directly served core-preservation and Republican po-

litical goals. First, Plaintiffs' complaints about compactness and boundary splits, *id.* 21-23, are *necessary consequences* of preserving District 3, because *all* such "flaws" were inherited from Benchmark District 3 (which perpetuated a *Shaw remedy*), J.S. 27-28. Accordingly, these "flaws" would have occurred without Section 5 because District 3 would have been preserved anyway, under the Plan-wide core-preservation and incumbency-protection factors.

Second, Plaintiffs' contention that Janis's predominant goal was to ensure that District 3 not have "*less* percentage of BVAP [than]" Benchmark District 3, Pl. Mot. 11, confirms that Enacted District 3's *augmentation* of the BVAP could not have been driven by this "racial" goal. Thus, it must be explained by the political effect of the swaps with adjacent districts, which, it remains undisputed, all benefitted the affected Republican incumbents. J.S. 17-19.

2. Thus, District 3's racial composition cannot be attributed to race rather than politics because it is the best (and, on the undisputed record, *only*) way of returning 8 Republicans to Congress. Plaintiffs do not dispute that Enacted District 3 directly serves this political goal or that its configuration would have made "perfect sense" if everyone involved were "white." Tr. 128; J.S. 17-24.

Plaintiffs nonetheless assert that race must have predominated because, for the first time in American history, the Legislature did not want to return the majority party's incumbents to Congress. Pl. Mot. 24-25. As noted, however, any such assertion directly contradicts the majority's express finding and the undisputed evidence. It also contradicts Plaintiffs'

concession that the Legislature sought to preserve the "will of the Virginia electorate as it was expressed in the November 2010 elections" by ensuring only "minimal" changes to the districts. J.S. 20. So all agree that the Legislature's neutral policy was to preserve the 8-3 split produced in 2010 through a strategy of minimal, politically beneficial alterations to existing districts—precisely what was done in District 3. Unable to deny this basic reality, Plaintiffs are reduced to the semantic quibbles that Janis did not utter the phrase "8-3" when he avowedly preserved the districts that had produced that split, and that the incumbent recommendations he uniformly followed were purportedly based on disinterested advice about "communities of interest." Pl. Mot. 15. Even assuming incumbents would recommend *detrimental* changes, "communities of interest" in Virginia include "communities" defined by "*political beliefs, voting trends and incumbency considerations*," so the incumbents could have made politically beneficial suggestions under Plaintiffs' theory. Pl. Ex. 5 at 2 (emphasis added).

3. As noted, Plaintiffs flunked *Easley*'s alternative-plan requirement because, it is undisputed, their Alternative Plan converts District 2 into a "heavily Democratic" district and performs "significantly" worse on the *Legislature's* preferred non-federal principles—preserving "cores" in order to protect all incumbents. Tr. 119, 152-53, 422-23.

The Alternative Plan also fails to achieve "significantly greater racial balance" because its District 3 concededly "subordinates traditional districting principles to race" to satisfy a 50.1% black "quota." *Id.* 172-73, 180. Plaintiffs nevertheless contend that this

requirement is met because the "percentages of black and white voters within and among the districts [are] more balanced" under their 50.1% quota than the 56.3% Enacted District. Pl. Mot. 30. Under this test, a 55% or 53.1% BVAP District 3 satisfies *Easley*, although Plaintiffs elsewhere contend that those percentages are impermissible quotas. *Id.* 15-18. And Plaintiffs' 50.1% quota is no better, since it subordinates both *Plaintiffs'* preferred traditional principles and the *Legislature's* principal core-preservation goal. Plaintiffs' test not only eliminates the word "significantly" from *Easley*, it does nothing to illuminate *Easley*'s "critical" question, 532 U.S. at 252, of whether race caused the challenged district to be different than it would have been absent race. Since Plaintiffs' alternative concededly *violates Shaw*, it cannot expose or remedy a *Shaw* violation.

Recognizing these fatal defects, Plaintiffs argue that *Easley's* instruction for what plaintiffs must show "at the least," *id.* at 258, virtually never applies, obtaining only when there is "little direct evidence" of racial considerations, Pl. Mot. 26. But *Easley* never hints at a "direct evidence" exception. To the contrary, it explains that "direct" evidence that the "legislature considered race" or desired a "racial balance" "says little or nothing about whether race played a *predominant* role comparatively speaking" and thus must be supplemented with an alternative plan. 532 U.S. at 253. Finally, the "direct evidence" in *Easley* was worse than anything here. *Id.*[1]

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[1] Plaintiffs do not respond to Appellants' demonstration that Dr. McDonald's VTD analysis was worse than that rejected as a

4. Finally, Janis's statements do not reflect an impermissible racial purpose. J.S. 20-23. Plaintiffs cite cases where a desire to create a majority-minority district evinced an improper racial purpose only because it "was not required under a correct reading" of the VRA. *Shaw v. Hunt*, 517 U.S. 899, 911 (1996) (Pl. Mot. 11); *Bush v. Vera*, 517 U.S. 952 (1996) (Pl. Mot. 12). Here, it is undisputed that Janis's frequent recitation that Section 5 prohibits "retrogression" in District 3 was *correct*. And Plaintiffs do not dispute either that Janis's statements *echo* every *judicial* redistricting or that resting *Shaw* liability on a *correct* reading of Section 5 would convert VRA compliance from a compelling justification for racial considerations into a compelling admission that race predominated. J.S. 12-14. [2]

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matter of law in *Easley*. J.S. 31-34. Instead, Plaintiffs seek to defend a *subset* of Dr. McDonald's analysis—*swapped* VTD's—but simply mimic his basic error. Pl. Mot. 23-24. Specifically, Plaintiffs cherry-pick "highly Democratic" swapped VTDs, while consideration of *all* swapped VTDs establishes that these swaps' political effect is indistinguishable from their racial effect. J.S. 19-20.

[2] The one Janis reference to BVAP (as opposed to "retrogression") was that he "took into consideration the "current percentage of voting age population," along with the "recommendations" of "Congressman Scott in District 3." Pl. Ex. 43 at 13 (Pl. Mot. 11). Particularly in this context, where any racial bloc voting analysis could not have demonstrated that a BVAP reduction was nonretrogressive, J.S. 37, considering such factors to assess retrogression was quite sensible. Moreover, unable to defend the majority's deceptive quotes "showing" a 55% BVAP threshold, J.S. 23 n.1; J.S. App. 21a n.16, Plaintiffs instead misleadingly quote statements of Senator Vogel, Pl. Mot. 17-18, concerning the *Virginia Senate* redistricting plan made one legislative ses-

Again, even if Janis's correct recitation of Section 5 reflects a legislative purpose to achieve 53.1% (or 55%) BVAP, that cannot support a *Shaw* violation because there is no evidence or finding that achieving these racial percentages conflicted with the race-neutral principles applied to all districts.

II. APPELLEES FAIL TO REHABILITATE THE NARROW TAILORING ERRORS

Appellees also fail to rehabilitate the majority's narrow tailoring errors. Plaintiffs note that "least restrictive means" "appear[s] nowhere in the opinion," Pl. Mot. 31—but Appellants never contended otherwise, J.S. 33-37. Rather, Appellants showed that, while the majority dropped this *verbiage* from its prior opinion after *Alabama* expressly rejected that test, it nonetheless continued to condemn District 3 because it increased BVAP above the Benchmark. *Id.*

Plaintiffs argue that the majority did not place the Legislature in a "racial straightjacket" because it "did not require justification of CD3's BVAP down to the last decimal." Pl. Mot. 33. But they nowhere dispute that the majority's analysis prohibits BVAP *increases* and, thus, *magnifies* race-consciousness. J.S. 34-36. Moreover, like the majority, Plaintiffs chide the Legislature for failing to perform a racial bloc voting analysis, Pl. Mot. 31-32—yet they do not dispute that their racial bloc voting analysis would require no more than *30%* BVAP in District 3, which would indisputably be denied preclearance, J.S. 37.

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sion *before* adoption of the Enacted Plan, Int.-Def. Ex. 32 at 18; Def. Mot. 14.

Finally, Plaintiffs nowhere dispute that the Enacted Plan with 56.3% BVAP was the *only* plan that achieved the Legislature's preferred race-neutral objectives. *Id.* 35. Plaintiffs are therefore contending that a legislature may not comply with *Shaw* by selecting the Section 5-compliant option that *least* subordinates traditional principles to race. J.S. 34-35. This Court, however, has foreclosed any such "trap for an unwary legislature." *Ala.*, 135 S. Ct. at 1274.

III. APPELLANTS HAVE STANDING

The district court granted Appellants intervention in accordance with myriad prior cases. *Wright v. Rockefeller*, 376 U.S. 52 (1964); *King v. Ill. State Bd. of Elections*, 410 F.3d 404 (7th Cir. 2005); *Hall v. Virginia*, 276 F. Supp. 2d 528 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004). Plaintiffs did not oppose intervention when Appellants' cognizable interests faced only potential injury, but now oppose standing when Appellants face *certain* harm from the majority's order. Pl. Mot. 6-8.

This effort fails: as *defendants* seeking to *preserve* the Enacted Plan, Appellants' harm flows not from the *Plan*, but the majority's *order* requiring changes to the Plan. Accordingly, Appellants have standing to appeal because they "likely" face an "injury" caused by the *order*, redressable by appellate reversal. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

Indeed, Appellants' injury is not merely likely, but *certain*. Plaintiffs do not dispute that the order necessarily requires changing at least one district represented by an Appellant. The majority concluded that the Legislature retained too many black

(overwhelmingly Democratic) voters in District 3. J.S. App. 1a-3a. Any remedy must therefore move such voters *out* of District 3 and into one or more of the surrounding Republican districts, and an equal number of (white) voters into District 3. Thus, any remedy approved by the "Republican[-]majority" Legislature (and *Democratic* governor), Pl. Mot. 8, or the court, will necessarily alter districts where Appellants have previously been elected.

Such changes will be particularly injurious because they will undo an Appellant's recommendations for his district, replace a portion of "his base electorate" with unfavorable Democratic voters, and harm Appellants as Republican voters. *King*, 410 F.3d at 409 n.3; *see Meese v. Keene*, 481 U.S. 465, 474-75 (1987) (standing based on harms to "chances for reelection"). Moreover, Plaintiffs' Alternative Plan, which will at least be a starting point for any remedy, harms Appellant Rigell by turning District 2 "heavily Democratic." Tr. 119, 152-53; J.S. 3. These harms are precisely the kind of "direct stake[s]" that confer standing to appeal. *Hollingsworth*, 133 S. Ct. at 2662.

United States v. Hays, 515 U.S. 737 (1995) (Pl. Mot. 8), confirms these points. Just as a plaintiff is injured by a redistricting plan if he resides in the district affected by the alleged unconstitutionality, Appellants are injured by the majority's command to alter District 3 because they represent districts that will necessarily be affected by that order. Even though it involves intervention, *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995) (Pl. Mot. 8), also confirms Appellants' standing. The court there granted intervention to a congresswoman in a district

No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court for the Eastern District of Virginia

JOINT APPENDIX (VOLUME I OF III)

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TABLE OF CONTENTS

Page

VOLUME I

Defendants' Memorandum in Support of Motion for Summary Judgment (Excerpts) 1

Intervenor-Defendants' Memorandum in Support of Motion for Summary Judgment (Excerpts) 3

Submission Under § 5 of the Voting Rights Act: 2012 Va. Acts Ch. 1 (February 1, 2012) (Plaintiffs' Trial Exhibit 1) 13

Senate Committee on Privileges and Elections Committee Resolution No. 2—Congressional District Criteria (March 25, 2011)(Plaintiffs' Trial Exhibit 5) 97

Legislative History of 2012 Virginia Congressional District Plan (January 26, 2012) (Plaintiffs' Trial Exhibit 8) 100

Senate Committee on Privileges and Elections Subcommittee on Redistricting, Public Hearing (Plaintiffs' Trial Exhibit 12) 110

The Committee on Privileges and Elections, Public Meeting (April 11, 2011) (Plaintiffs' Trial Exhibit 13) 114

In the Matter of the Committee on Privileges and Elections, Notice of Public Meeting for Discussion of Senate Bill 5004 (June 9, 2011) (Plaintiffs' Trial Exhibit 14) 123

HB 251 Introduced – Delegate Bell, Population Totals (Plaintiffs' Trial Exhibit 16) 127

Current Congressional Districts District Population Summary (Plaintiffs' Trial Exhibit 17) 136

SB 5004 – M. Locke Population Voting Data (Plaintiffs' Trial Exhibit 18) 145

Letter from Francis S. Ferguson to Voting Section Chief, Elizabeth Johnson (February 13, 1998) (Plaintiffs' Trial Exhibit 21) 151

Curriculum Vitae of Dr. Michael P. McDonald (Plaintiffs' Trial Exhibit 25) 155

Summary of Expert Report of Dr. Michael P. McDonald (Plaintiffs' Trial Exhibit 26) 175

Expert Report of Dr. Michael P. McDonald (December 6, 2013) (Plaintiffs' Trial Exhibit 27) 187

Reply Report of Dr. Michael McDonald (January 24, 2014) (Plaintiffs' Trial Exhibit 28) 235

Analysis by Dr. Michael McDonald of Plaintiffs' Proposed Alternative Congressional Plan (February 21, 2014) (Plaintiffs' Trial Exhibit 29) 257

Dr. Michael P. McDonald Reply Report to Mr. Morgan (March 24, 2014) (Plaintiffs' Trial Exhibit 30) 274

Intervenor-Defendant Congressman Eric Cantor's Answers to Plaintiffs' Interrogatories and Requests for Production (January 13, 2014) (Plaintiffs' Trial Exhibit 33) (Excerpts) 297

Intervenor-Defendant Congressman Randy Forbe's Answers to Plaintiffs' Interrogatories and Requests for Production (January 13, 2014) (Plaintiffs' Trial Exhibit 34) (Excerpts).....303

Intervenor-Defendant Congressman Bob Goodlatte's Answers to Plaintiffs' Interrogatories and Requests for Production (January 13, 2014) (Plaintiffs' Trial Exhibit 35) (Excerpts).....309

Intervenor-Defendant Congressman Morgan Griffith's Answers to Plaintiffs' Interrogatories and Requests for Production (January 13, 2014) (Plaintiffs' Trial Exhibit 36) (Excerpts).....315

Intervenor-Defendant Congressman Robert Hurt's Answers to Plaintiffs' Interrogatories and Requests for Production (January 13, 2014) (Plaintiffs' Trial Exhibit 37) (Excerpts).....325

Intervenor-Defendant Congressman Scott Rigell's Answers to Plaintiffs' Interrogatories and Requests for Production (January 13, 2014) (Plaintiffs' Trial Exhibit 38) (Excerpts).....332

Intervenor-Defendant Congressman Robert J. Wittman's Answers to Plaintiffs' Interrogatories and Requests for Production (January 13, 2014) (Plaintiffs' Trial Exhibit 39) (Excerpts).....338

Intervenor-Defendant Congressman Frank Wolf's Answers to Plaintiffs' Interrogatories and Requests for Production (January 13, 2014) (Plaintiffs' Trial Exhibit 40) (Excerpts).....344

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DAWN CURRY PAGE, *et al.*,	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.**
	)	**3:13cv678**
	)	
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants Charlie Judd, in his capacity as Chairman of the Virginia State Board of Elections, Kimberly Bowers, in her capacity as Vice-Chair of the Virginia State Board of Elections, and Don Palmer, in his capacity as Secretary of the Virginia State Board of Elections (collectively "the SBE defendants"), by counsel, and pursuant to this Court's December 6, 2013 Order, state as follows for their Memorandum In Support Of Motion For Summary Judgment.

I. INTRODUCTION

On January 25, 2012, the Virginia General Assembly enacted new congressional district boundaries, a result of the redistricting process required by the U.S. and Virginia Constitutions. At

that time, and during the entirety of the redistricting process, Virginia was a covered jurisdiction pursuant to Section 4 of the Voting Rights Act of 1965. Federal law required Virginia to comply with Section 5 of the Voting Rights Act by ensuring that Virginia's redrawn districts did not result in any retrogression in the ability of minority voters to elect a candidate of choice. As a result, federal law required Virginia's Third Congressional District - the sole majority-minority congressional district in Virginia - to remain a majority-minority district. In compliance with federal law as it applied to Virginia at that time, Virginia did just that.

* * *

[Page 12]

2. *Virginia complied with Section 5 by maintaining the Third District as a majority-minority district.*

After population equality, the second criterion Virginia adopted for drawing district lines was compliance with applicable federal and state laws, expressly including the Voting Rights Act. *See* DOJ Submission Excerpts - Att. 4 (Ex. E). And to the extent there was a conflict in criteria, population equality and compliance with the Voting Rights Act were given priority. *Id.* As noted above, courts have acknowledged that compliance with Section 5 requires both states - and even courts themselves - to consider race in drawing district lines. *See Cromartie II*, 532 U.S. at 241; *Backus*, 857 F. Supp. 2d at 565; *Colleton*, 201 F. Supp. 2d at 640.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAWN CURRY PAGE, et al., **Plaintiffs,** **v.** **VIRGINIA STATE BOARD OF ELECTIONS, et al.,** **Defendants.**	)	**Civil Action No.: 3:13-cv-678**

INTERVENOR-DEFENDANTS
VIRGINIA REPRESENTATIVES'
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

* * *

[Page 11]

ARGUMENT

I. PLAINTIFFS' CONCESSION THAT THE ENACTED PLAN WAS CONSTITUTIONAL AT ITS ADOPTION DEFEATS THEIR CLAIM

Plaintiffs' concession that the General Assembly acted with a constitutional, non-discriminatory purpose when it preserved District 3 as a majority-black district in the Enacted Plan defeats their *Shaw* claim. Indeed, that concession forecloses Plaintiffs from proving that the General Assembly adopted the Enacted Plan "because of" its alleged discriminatory effects. *Personnel Adm'r v. Feeney*, 442 U.S. 265, 279 (1979). Moreover, *Shelby County*'s post-enactment

removal of Virginia's Section 5 obligations for *future* changes to its election laws did not obligate Virginia to do *anything*, much less replace the Enacted Plan mid-decade after it had been constitutionally used in the 2012 election. The Court should grant Defendants summary judgment.

A. Plaintiffs Cannot Satisfy Their Burden To Prove That The General Assembly Adopted The Enacted Plan With A Discriminatory Purpose

It is well-established that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *see also Feeney*, 442 U.S. at 279; *Washington v. Davis*, 426 U.S. 229, 240 (1976). This requirement is particularly exacting for *Shaw* racial gerrymander claims. In such cases, the plaintiff must prove that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916 (emphasis added). For a plaintiff to succeed, "[r]ace must not simply be *a* motivation for the drawing of a majority-minority district." *Easley*, 532 U.S. at 241; *cf. Arlington Heights*, 492 U.S. at 266 ("[D]iscriminatory purpose must have been 'a motivating factor in the decision.'"). Thus, the plaintiff must show that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Easley*, 532 U.S. at 241. Plaintiffs bear the burden to make this showing, and it is "a demanding one." *Id.*

Plaintiffs, however, do not even *allege* that the General Assembly "acted with" an impermissible discriminatory purpose, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (*Bossier I*), or that improper racial considerations were the "predominant factor motivating the legislature's decision" to adopt the Enacted Plan, *Miller*, 515 U.S. at 916. Rather, they forthrightly concede that District 3 was maintained as a majority black district "because of," *Feeney*, 442 U.S. at 279, the need to comply with the "non-retrogression" command of Section 5 of the Voting Rights Act. *See* Compl. ¶¶ 1-6. It is well-recognized and undisputed that compliance with Section 5 is not an impermissible purpose under *Shaw*. Indeed, compliance with Section 5 is not just a *legitimate* purpose, it is a "compelling state interest" which justifies race-conscious districts that might otherwise violate the *Shaw* standard. *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 639 (D.S.C. 2002) (three-judge court) ("[C]ompliance with the Voting Rights Act is a compelling state interest."); *Backus*, 857 F. Supp. 2d at 559 ("[C]ompliance with the Voting Rights Act is a compelling state interest."); *LULAC v. Perry*, 548 U.S. 399, 475 n.12 (2006) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part) ("agree[ing] . . . that compliance with § 5 of the Voting Rights Act is also a compelling state interest"); *id.* at 485 n.2 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) ("agree[ing] . . .that compliance with § 5 is a compelling state interest"); *id.* at 518 (Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J., concurring in part and dissenting in part)

("compliance with § 5 of the Voting Rights Act can be" a compelling state interest).

Nor can there be any question that District 3 had to be maintained as a majority-black district under Section 5, particularly since a new, more stringent "no diminution in minorities' ability to elect" standard was added to Section 5 in 2006, precisely in order to require the preservation of such districts, by overturning the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that had permitted diminishing such districts in certain circumstances.[1]

Accordingly, all agree that the General Assembly's redistricting law was not tainted with an unconstitutional racial purpose. Since considerations of race in redistricting do not violate the Fourteenth Amendment if they further the compelling need to comply with Section 5, Plaintiffs' concession

---

[1] Congress amended Section 5 in 2006 to prohibit any change in voting or election laws that "diminish[ed] the ability" of minorities "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b), (d). Congress' avowed purpose was to overturn *Ashcroft*, which had construed Section 5 to permit conversion of majority-minority districts into minority-minority districts in certain circumstances. *Ashcroft*, 539 U.S. at 479-80. Congress vehemently criticized *Ashcroft* for "misconstru[ing] and narrow[ing] the protections afforded by Section 5." 42 U.S.C. § 1973c note, Findings (b)(6); *see also* H.R. Rep. No. 109-478, at 65-72, 93-94 (2006) (*e.g.*, Ashcroft made Section 5 "a wasteful formality," that perversely "would encourage states to turn black and other minority voters into second class voters"). Thus, Congress prohibited any diminution in minority voters' ability to elect their preferred candidate, thereby precluding reducing a majority-black district to a minority-black district or otherwise making a safe black district any less safe. 42 U.S.C. §§ 1973c(b), (d).

concerning Section 5 compliance requires summary judgment in favor of Defendants.

1. Plaintiffs seek to evade this inexorable logic by noting that Section 5 was subsequently invalidated in *Shelby County* and, consequently, "Virginia can no longer seek refuge in Section 5 as an excuse to racially gerrymander congressional District 3." Compl. ¶ 5. But, of course, events that occur *after* a legislature has acted cannot have influenced the legislature's purpose *when* it acted. And since the only basis upon which a state law can be invalidated under *Shaw* is an improper legislative purpose, subsequent events which cannot possibly shed light on that purpose are, by definition, irrelevant and offer no grounds for invalidation.

The only action that the General Assembly has taken with respect to congressional redistricting was passing the Enacted Plan in 2012. Since this action complied with the Constitution because it was motivated by the non-racial—indeed, compelling—purpose of Section 5 compliance, the redistricting law does not constitute a constitutional violation and therefore cannot be altered or overturned by a federal court. *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) ("Federal remedial power may be exercised only on the basis of a constitutional violation."). Thus, Plaintiffs' entire theory is irreconcilable with the self-evident truism that a constitutional law cannot be struck down as unconstitutional.

For this reason, Plaintiffs' assertion that "Virginia can no longer seek refuge in Section 5," Compl. ¶ 5, is simply baffling, and reflects their fundamental confusion concerning the only allegedly

unconstitutional state action they may challenge and the only action they are challenging. The General Assembly does not need to "take refuge under Section 5" now or in 2014, because it is not doing anything concerning redistricting now or in 2014. The only redistricting action the General Assembly has taken occurred in 2012, when all agree it *could* "seek refuge in Section 5." Since Section 5 existed at that relevant time of passage, and since the only legally relevant question is the interest underlying the law that was enacted, the conceded fact that the Enacted Plan was constitutionally justified means that the Enacted Plan is constitutional, regardless of whether it would have been unconstitutional if passed in 2014.

The validity of the legislative purpose underlying challenged laws is obviously assessed by examining the purpose underlying the law in the real world; *i.e.*, the interest or purpose of the legislature that actually enacted the law at the time they actually enacted it in light of the actual realities extant at that time. It is not assessed, as Plaintiffs apparently believe, on what the Legislature's purpose would have been in an alternative, hypothetical world that did not exist— *i.e.*, a world without Section 5. Every case assessing discriminatory purpose confirms this truism.

As noted, the question under *Shaw* is whether an impermissible consideration of race was the "predominant factor *motivating the legislature's decision*" on the districts' racial composition. *Miller*, 515 U.S. at 916 (emphasis added); *see also Easley*, 532 U.S. at 241 ("motivation for the drawing of a majority-minority district"); *Feeney*, 442 U.S. at 279 (was the legislature's decision "because of" an

impermissible factor). Accordingly, the question is what was the interest or motive of the enacting legislature. And a legislature can only be motivated by, and can only have an interest regarding, things that exist (Section 5), not by things that do not exist (the Supreme Court's later invalidation of Section 5). Since it is conceded that compliance with Section 5 was the General Assembly's predominant purpose or compelling interest underlying District 3's racial composition in 2012, the predominant factor motivating that decision could not have been an improper consideration of race.

Consequently, every court's assessment of a racial gerrymander purpose has examined the legislative record and evidence to determine whether the proscribed discriminatory purpose existed *at the time* the redistricting plan was enacted, not some later time. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 905-06 (1996) (*Shaw II*); *Easley*, 532 U.S. at 1464-70; *Miller*, 515 U.S. at 917; *Old Person v. Cooney*, 230 F.3d 1113, 1130 (9th Cir. 2000) (rejecting discrimination claim where "there was no discriminatory purpose in the adoption of the plan"); *Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012) (three-judge court) (holding that past history of racial discrimination in voting did not establish discriminatory purpose in enactment of redistricting plan); *Fletcher*, 831 F. Supp. 2d at 901 (past "lamentable incidents of racism in Maryland" did not taint redistricting plan).

While legislative purpose is always assessed by what the legislature thought at the time of enactment, this analysis is particularly required when assessing a "compliance with the Voting Rights Act" justification under *Shaw*. This is because such

justifications do not turn on whether Section 5 *required* the majority-minority district enacted by the legislature, but whether the legislature had a strong *reason to believe* that Section 5 so required. Specifically, "if the State has a '*strong basis in evidence*' for concluding that creation of a majority-minority district is reasonably necessary to comply with [the Voting Rights Act], and the districting that is based on race 'substantially addresses the [Voting Rights Act] violation,' it satisfies strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 977 (1996) (quoting *Shaw I*, 509 U.S. at 656; *Shaw II*, 517 U.S. at 918 (emphasis added)); *see also Colleton County*, 201 F. Supp. 2d at 639 ("If there is a strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with the [Voting Rights] Act, and the race-based districting substantially addresses the violation, the plan will not fail under the Equal Protection analysis."); *Backus*, 857 F. Supp. 2d at 559 (same); *Moon*, 952 F. Supp. at 1149 (same).

Here, it is undisputed and clear that the General Assembly had a strong—indeed, compelling—evidentiary basis to conclude that converting District 3 from a majority-black district into a minority-black district would constitute impermissible retrogression, particularly under the more stringent "ability to elect" standard that was added to Section 5 for the avowed purpose of overturning *Ashcroft's* authorization of so diminishing majority-minority districts. *See supra* p. 13 & n.1. Accordingly, District 3 indisputably satisfies *Shaw* because the General Assembly had a strong basis in evidence to conclude

that it had to be maintained as a majority-black district.

Indeed, the requirement that a Voting Rights Act justification focus exclusively on legislative purpose at the time of enactment is so strong that the Supreme Court forecloses judicial inquiry even to post-enactment *evidence* supporting the legislature's articulated Voting Right Act justification, because that evidence was not before the legislature at the time of enactment. *See, e.g., Shaw II*, 517 U.S. at 910 (rejecting a voting analysis demonstrating that the challenged district was required by Section 2 because the analysis was not before the legislature at the time of enactment). Since courts cannot consider even post-enactment *evidence* concerning Section 5 compliance because the legislature did not actually consider that available evidence, they *a fortiori* cannot consider post-enactment invalidation of Section 5, which the legislature *could not* have considered because it was not available.

The final proof that discriminatory purpose is to be assessed solely by the enacting legislature's purpose at the time of enactment is provided by the cases striking down laws because the enacting legislature had an illicit purpose, but upholding the *same* laws when enacted by a subsequent legislature with new information and a different purpose. *See Hunter v. Underwood*, 471 U.S. 222, 231 (1985) (striking down felon disenfranchisement provision enacted with discriminatory purpose even though that purpose had dissipated and state could reenact the provision without that purpose); *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (upholding dismissal of challenge to current felon disenfranchisement law

where enactment could not be "traced to a purpose to discriminate on the basis of race" and there was no "discriminatory purpose behind the course of action," even though prior disenfranchisement laws had been enacted for discriminatory purpose (emphasis in original)); *Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1222-25 (11th Cir. 2005) (same). Just as a law with an unconstitutional purpose at enactment remains unconstitutional notwithstanding subsequent developments affecting purpose, a law with a constitutional purpose at enactment remains constitutional notwithstanding subsequent developments affecting purpose.

In sum, since the Enacted Plan's District 3 concededly was motivated by a legitimate, compelling purpose, that District is constitutional because the only relevant constitutional issue is the enacting legislature's purpose. Counter-factual hypotheticals concerning what the legislature should have or would have done if Section 5 did not exist are of no moment.

* * *

SUBMISSION UNDER § 5 OF THE VOTING RIGHTS ACT:
2012 VA. ACTS CH. 1
REDISTRICTING VIRGINIA'S U.S. CONGRESSIONAL SEATS

DATE: February 1, 2012

SUMMARY: This summary outlines the information provided in this submission pursuant to 28 C.F.R. §§ 51.27 and 51.28. The summary either provides the information requested or references the appropriate attachment.

Section 51.27

(a) Attested copy of Ch. 1, 2012 Va. Acts **(Attachment 1)**.

(b) Copy of current Va. Code § 24.2-302.1 **(Attachment 2)**.

(c) Statement of the change. **Attachment 3** provides a detailed explanation of Chapter 1 redistricting Virginia's U.S. Congressional districts.

(d) E. Duncan Getchell, Jr. Solicitor General Office of the Attorney General 900 East Main Street Richmond, Virginia 23219 804-786-7140

(e) Commonwealth of Virginia

(f) Not applicable

(g) Act of the Virginia General Assembly

(h) Va. Const. art. II § 6 (1971) requires the General Assembly to reapportion the Commonwealth into electoral districts every ten years, beginning in 1971:

"Section 6. Apportionment.

"Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.

"Any such decennial reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV, Section 13, of this Constitution.

"The districts delineated in the decennial reapportionment law shall be implemented for the November general election for the United States House of Representatives, Senate, or House of Delegates, respectively, that is held immediately prior to the expiration of the term being served in the year that the reapportionment law is required to be enacted. A member in office at the time that a decennial redistricting law is enacted shall complete his term of office and shall continue to represent the

district from which he was elected for the duration of such term of office so long as he does not move his residence from the district from which he was elected. Any vacancy occurring during such term shall be filled from the same district that elected the member whose vacancy is being filled."

Pursuant to Va. Const. art. IV § 11 and art. V § 6, redistricting is accomplished by a general law adopted by a majority vote of the Virginia House of Delegates and Senate of Virginia and approved by the governor. To guide the legislative deliberations, on March 25, 2011, the Senate Committee on Privileges adopted Committee Resolution 2, establishing goals and criteria concerning applicable legal requirements and policy objectives for redrawing of Congressional districts. **Attachment 4**.

(i) Chapter 1, 2012 Va. Acts was adopted by the General Assembly on January 20, 2012, presented to the governor on January 23, 2012, and thereafter signed by the governor.

(j) Pursuant to Va. Const. art. II § 6 (1971), 2012 Va. Acts ch. 1 became effective, once enrolled, on January 25, 2012.

(k) Chapter 1 has not yet been enforced or administered.

(l) Chapter 1 affects all of Virginia's Congressional districts.

(m) A statement of the reasons for the change is included in Attachment 3. *See also* item (h) above.

(n) A detailed statement of anticipated effect on members of racial minority groups is provided in **Attachment 5**.

(o) Statement identifying past or pending litigation concerning the change or related voting practices. **Attachment 6**.

(p) Virginia Code § 24.2-302.1, containing Virginia's current Congressional districts, was last amended on August 17, 2001, and was last precleared on October 16, 2001.

As discussed in item (h) above, 2012 Va. Acts ch. 1, redistricting Virginia's Congressional districts, was adopted pursuant to the procedure provided in Va. Const. art. II § 6, art. IV § 11, and art. V § 6. Article II § 6 was precleared on July 6, 2004. Article IV § 11 was precleared on July 11, 1980. Article V § 6 was precleared on August 23, 1994.

(q) See items referenced under § 51.28

(r) See items referenced under § 51.28

Section 51.28 (a) Demographic information

(1) Total and voting age population for each district under present Va. Code § 24.2-302.1 and under Chapter 1 by race are provided in Attachment 7 which includes demographic reports. Total and voting

age population for the statewide alternative plans (referred to as HB 5004, SB 5003, and SB 5004 in the 2011 Special Session) are included in **Attachment 7**.

Total and voting age population for each district under present Va. Code § 24.2-302.1, which includes demographic reports, and total and voting age population for the alternative plans are included in **Attachment 7**.

A "Block assignment" file and a "2010 Precincts" file in two formats are included on CD in **Attachment 7**.

Total and voting age population for current and new Congressional districts and the block assignment file may also be accessed over the Internet on the Division of Legislative Services website at: http://redistricting.dls.virginia.gov/.

(2) Information on the number of registered voters by race or language group is not available in Virginia. The number of registered voters by precinct as of November 2010 is provided in **Attachment 7**.

Attachment 8 is a chart identifying names of Minority candidates for Congress for the years 2001-2010. This chart is anecdotal information collected by the Office of the Attorney General.

(3) Official 2010 population information, including precinct and block data and

racial and language population data, was received from the U.S. Bureau of Census on February 3, 2011, and is included in Attachment 7. The official U.S. Census data immediately became part of the public records available to individuals and groups participating in the redistricting process. This information was the sole information used in connection with the adoption of the change. **Attachment 9** is the Census 2010 Population Count Explanation.

(b) Maps

(1) Maps showing current and new district boundaries are contained in **Attachment 10**. This information was provided by the Virginia Division of Legislative Services. Maps showing current and new Congressional districts may also be accessed over the Internet on the Division of Legislative Services website at: http://redistricting.dls.virginia.gov/. Maps of alternative plans are included in **Attachment 10**.

(2) Not applicable. Chapter 1 does not change voting precincts. Changes in voting precincts are the responsibility of local governments.

(3) The locations of concentrations of the racial minority groups by total and voting age population by precinct are shown in Attachment 10. This

information was provided by the Virginia Division of Legislative Services.

(4) Topographical maps of the Commonwealth of Virginia and of the Congressional Districts showing any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units are shown in **Attachment 10** and were provided by the Division of Legislative Services. The 2010-2012 Official State Transportation Map provided by the Virginia Department of Transportation is in **Attachment 10**.

(5) &(6) Not applicable. Chapter 1 does not change polling places or voter registration sites. Such changes are the responsibility of local government.

(c) Not applicable

(d) Election return data relating to Congressional elections for the years 2002-2010 are provided in **Attachment 11**. Election

http://www.sbe.virginia.gov/cms/Election_Information/Election_Results/Index.html

(e) Not applicable.

(f) Publicity and participation.

(1) The 2011-12 Virginia legislative redistricting process received extensive statewide media coverage. **Attachment 12** provides a sampling of representative newspaper articles beginning September

7, 2010.

(2) Notices of Public Hearings were mailed to the media through the Commonwealth. Notices of Committee meeting and floor sessions were provided to the General Assembly and to the public through the meeting notice listings on the websites of the General Assembly and Legislative Information Systems, and through the official calendars of the House of Delegates and Senate of Virginia. A publication of the Virginia Division of Legislative Services, *Drawing the Line 2011, Redistricting in Virginia*, was mailed to the members of the General Assembly and public. Copies of the notices and *Drawing the Line 2011* are provided in **Attachment 13**.

Information regarding redistricting was also provided on the Virginia Division of Legislative Services website at:

http://www.sbe.virginia.gov/cms/Election_Information/Election_Results/Index.html

A summary of the dates upon which proposed Congressional redistricting plans were added to the website is provided in **Attachment 14**.

(3) Summaries of the extensive public hearings on redistricting for the Virginia Congressional seats are provided in **Attachment 15**. True copies of the full

transcripts, together with statements filed at the hearings, are included in **Attachment 15**. The transcripts are also accessible on the Virginia Division of Legislative Services website at:

http://redistricting.dls.virginia.gov/.

(4) Statements, speeches and other public communications submitted in connection with the adoption of Chapter 1 are provided in **Attachment 16**. Included are reports of comments made by the public to the Congressional plans that were online.

(5) **Attachments 15 and 16** include comments from the general public.

(6) **Attachment 17** provides a summary of the legislative history of Chapter 1 along with recorded votes in committee and on the floor. DVD recordings of the floor debates in the Senate of Virginia and House of Delegates on Congressional Redistricting Plans are included, along with summaries of the floor debates.

Included is the legislative history of statewide alternate plans HB 5004, SB 5003, and SB 5004 from the 2011 Special Session, and SB 455 from the 2012 Session.

Also included are transcripts of the Senate Privileges and Elections Committee meetings, House Privileges and Elections Committee meetings, and summaries of the meetings. The

transcripts are also accessible on the Virginia Division of Legislative Services website at:

http://redistricting.dls.virginia.gov/.

(g) Availability of the submission

(1) **Attachment 18** provides a copy of the press release announcing the submission to the United States Attorney General, informing the public of the availability of a complete duplicate copy of the submission for public inspection and inviting comments for the consideration of the Attorney General. Notice was sent to all news media and should appear in major newspapers statewide.

(2) The portions of **Attachment 17** on DVD are available to the public for copying.

(h) Minority group contacts. The following individuals are familiar with the proposed change and were active in the political process

Members of the House of Delegates Privileges and Elections Committees in 2011 and 2012:

The Honorable Kenneth C. Alexander
General Assembly Building, Room 412
Capitol Square
Richmond, Virginia 23219
804-698-1089
email
DelKAlexander@house.virginia.gov

The Honorable Algie T. Howell, Jr.

General Assembly Building, Room 512
Capitol Square
Richmond, Virginia 23219
804-698-1090
email DelAHowellAhouse.virginia.gov

The Honorable Rosalyn R. Dance
General Assembly Building, Room 813
Capitol Square
Richmond, Virginia 23219
804-698-1063
email DelRDance@house.virginia.gov

The Honorable Lionell Spruill, Sr.
General Assembly Building, Room 702
Capitol Square
Richmond, Virginia 23219
804-698-1077
email DelLSpruill@house.virginia.gov

Member of the Senate Privileges and Elections Committees in 2011 and 2012:

The Honorable A. Donald McEachin
General Assembly Building, Room 318
Capitol Square
Richmond, Virginia 23219
804-698-7509
email district09@senate.virginia.gov

The Commonwealth maintains a list of all who request notice of meetings related to redistricting. However, that list does not include racial identification information. More the less, a number of individuals representing groups or themselves spoke at the public hearings noted in Attachments 15 and 17.

2012 SESSION

ENROLLED

VIRGINIA ACTS OF ASSEMBLY - CHAPTER 1

An Act to amend and reenact § 2.2-508 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 24.2-302.2, and to repeal § 24.2-302.1 of the Code of Virginia, relating to congressional districts.

[H251]

Approved **JAN 25 2012**

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-508 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 24.2-302.2 as follows:

§ 2.2-508. Legal service in certain redistricting proceedings.

Upon notification by a county, city or town of a pending civil action challenging the legality of its election district boundaries as required by § 24.2-304.5, the Attorney General shall review the papers in the civil action and may represent the interests of the Commonwealth in developing an appropriate remedy that is consistent with requirements of law, including but not limited to Article VII, Section 5 of the Constitution of Virginia, Chapter 3 (~~§ 24.2-302.1~~ *24.2-302.2* et seq.) of Title 24.2, or Chapter 39 (§ 30-263 et seq.) of Title 30.

§ 24.2-302.2. Congressional districts.

A. There shall be 11 Virginia members of the United States House of Representatives elected from 11 congressional districts and each district is entitled to one representative.

B. All references in this section to boundaries of counties and cities shall be interpreted to refer to those in existence on April l, 2011, and as reported by the United States Bureau of the Census in the 2010 Census reports provided pursuant to United States Public Law 94-171, notwithstanding subsequent boundary changes by law, annexation, merger, consolidation, or the voiding of boundary changes theretofore made final.

C. Parts of counties and cities listed in subsection D are defined by reference to the 2010 Census reports for the precincts, parts of precincts, and blocks listed for each congressional district in the Statistical Report for this enrolled House bill on file with the Clerk of the House of Delegates. Precincts shall be interpreted to refer to those in existence on April 1, 2011, and as reported by the United States Bureau of the Census in the 2010 Census reports provided pursuant to United States Public Law 94-171, notwithstanding subsequent changes made by localities.

D. The 11 congressional districts are:

First. All of Caroline, Essex, Gloucester, King and Queen, King George, King William, Lancaster, Mathews, Middlesex, Northumberland, Richmond Stafford, Westmoreland, and York Counties: all of the Cities of Fredericksburg, Poquoson, and Williamsburg; part of Fauquier County comprised of the Bealeton (303), Catlett (102), Lois (104), and

Morrisville (301) Precincts and part of the Remington (302) Precinct; part of James City County comprised of the Berkeley A Part 1 (101), Berkeley A Part 2 (1012), Berkeley B Part 1 (1021), Berkeley B Part 2 (1022), Berkeley C (103), Jamestown A (201), Jamestown B (202), Powhatan A (301), Powhatan B (302), Powhatan C (303), Powhatan D (304), Roberts A Part 1 (5011), Roberts A Part 2 (5012), Roberts C Part 1 (5031), Roberts C Part 2 (5032). Stonehouse A (401). Stonehouse B (402), and Stonehouse C (403) Precincts and part of the Roberts B (502) Precinct; part of Prince William County comprised of the Ashland (309). Bennett (102), Benton (203), Brentsville (101), Bristow Run (111), Cedar Point (112), Ellis (106), Forest Park (310), Glenkirk (408), Henderson (307), Lake Ridge (501), Limestone (113), Lodge (207), Marshall (202), Marsteller (107), McCoart (204), Montclair (308), Mullen (411), Nokesville (104), Park (109), Pattie (305), Penn (210), Powell (211), Quantico (304), Sinclair (404), Stonewall (405), Sudley North (409), Victory (108), Washington-Reid (306), Westgate (407), Westridge (208), and Woodbine (209) Precincts and part of the Buckland Mills (110) Precinct; part of Spotsylvania County comprised of the Battlefield (701), Brent's Mill (702), Grange Hall (303), Hazel Run (302), Plank Road (301), and Summit (401) Precincts and part of the Lee Hill (403) Precinct, and part of the City of Newport News comprised of the Greenwood (110) Precinct.

Second. All of Accomack and Northampton Counties; all of the City of Virginia Beach; part of the City of Hampton comprised of the Asbury (205), Booker (201), Bryan (202), Burbank (203), Langley

(209), Phillips (213), Sandy Bottom (216), and Spats (113) Precincts and part of the Machen (210) Precinct; part of the City of Newport News comprised of the Boulevard (202), Charles (203), Deer Park (219), Hidenwood (208), Kiln Creek (218), Nelson (210), Oyster Point (105), Palmer (211), Richneck (107), Riverview (217), Sanford (213), Saunders (319), Sedgefield (315), Watkins (320), Wellesley (204), Windsor (109), and Yates (216) Precincts and parts of the Deep Creek (205), Hilton (209), Riverside (212), and Warwick (215) Precincts; and part of the City of Norfolk comprised of the Azalea Gardens (512), Barron Black (406), Bayview School (501), Crossroads (511), East Ocean View (503), Easton (408), Fairlawn (409), Lafayette (205), Larchmont Library (208), Larchmont Recreation Center (209), Larrymore (504), Little Creek (505), Northside (103), Ocean View Center (506), Ocean View School (102), Oceanair (508), Old Dominion (201), Suburban Park (215), Tarrallton (509), Third Presbyterian (510), Willard (218), and Zion Grace (106) Precincts.

Third. All of Charles City and Surry Counties; all of the Cities of Petersburg and Portsmouth; part of Henrico County comprised of the Adams (201), Antioch (501), Azalea (202), Cedar Fork (502), Central Gardens (206), Chickahominy (503), Donahoe (504), Dorey (505), Eanes (506), Elko (307), Fairfield (208), Glen Lea (209), Highland Gardens (211), Highland Springs (308), Laburnum (509), Maplewood (215), Masonic (510), Mehfoud (511), Montrose (512), Nine Mile (513), Pleasants (514), Rawl& (220), Rolfe (519), Sandston (515), Sullivan (516), Town Hall (517), Whitlocks (518), and Wilder (222) Precincts; part of Isle of Wight County comprised of parts of the Bartlett

(201), Carrollton (202), and Rushmere (301) Precincts; part of James City County comprised of part of the Roberts B (502) Precinct; part of Prince George County comprised of the Blackwater (202), Bland (201), Brandon (203), and Harrison (105) Precincts and part of the Rives (104) Precinct: part of the City of Hampton comprised of the Aberdeen (101), Armstrong (106), Bassette (102), Bethel (212), City Hall (103), Cooper (104), East Hampton (105), Forrest (204), Hampton Library (111), Jones (116), Kecoughtan (117), Kraft (208), Lindsay (107), Mallory (118), Phenix (109), Phoebus (110), Smith (112), Thomas (108), Tucker Capps (214), Tyler (215), and Wythe (115) Precincts and part of the Machen (210) Precinct; part of the City of Newport News comprised of the Bland (201), Briarfield (302), Carver (303), Chestnut (304), Denbigh (101), Downtown (305), Dunbar (306), Epes (102), Huntington (307), Jefferson (308), Jenkins (103), Lee Hall (108), Magruder (309), Marshall (310), McIntosh (104), Newmarket (311), Newsome Park (312), Reed (313), Reservoir (106), River (314), South Morrison (316), Washington (317), and Wilson (318) Precincts and parts of the Deep Creek (205), Hilton (2091, Riverside (212), and Warwick (215) Precincts; part of the City of Norfolk comprised of the Ballentine (301), Berkley (402), Bowling Park (303), Brambleton (403), Campostella (404), Chesterfield (405), Chrysler Museum (211), Coleman Place School (304), Ghent Square (203), Granby (101), Human Y (411), Immanuel (204), Ingleside (412), Lafayette-Winona (303), Lambert's Point (207), Lindenwood (306), Maury (210), Norview Methodist (308), Norview Middle School (309), Park Place (212), Poplar Halls (413), Rosemont (310),

Sherwood Rec Center (311), Sherwood School (312), Stuart (214), Tanner's Creek (302), Taylor Elementary School (213), Titustown Center (104), Tucker House (105), Union Chapel (313), United Way (415), Wesley (217), and Young Park (414) Precincts; part of the City of Richmond comprised of the 113 (113), 114 (114), 203 (203), 204 (204), 206 (206), 207 (207), 208 (208), 211 (211), 212 (212), 213 (213), 301 (301), 302 (302), 303 (303), 304 (304), 305 (305), 306 (306), 307 (307), 308 (308), 402 (402), 501 (501), 503 (503), 504 (504), 505 (505), 508 (508), 509 (509), 510 (510), 602 (602), 603 (603), 604 (604), 606 (606), 607 (607), 609 (609), 610 (610), 701 (701), 702 (702), 703 (703), 705 (705), 706 (706), 707 (707), 802 (802), 806 (806), 810 (810), 811 (811), 812 (812), 814 (814), 902 (902), 903 (903), 908 (908), 909 (909), 910 (910), and 911 (911) Precincts and part of the 404 (404) Precinct; and part of the City of Suffolk comprised of parts of the Bennetts Creek (104), Ebenezer (201), and Harbour View (103) Precincts.

Fourth. All of Amelia, Dinwiddie, Greensville, Nottawav, Powhatan, Southampton, and Sussex Counties, all of the Cities of Chesapeake, Colonial Heights, Emporia, Franklin, and Hopewell; part of Chesterfield County comprised of the Bailey Bridge (315), Beach (305), Bellwood (104 Beulah (202), Bird (203), Birkdale (317), Carver (112), Chippenham (207), Cosby (307), Crenshaw (414), Deer Run (302), Drewry's Bluff (105), Dutch Gap (110), Ecoff (108), Elizabeth Scott (109), Enon (103), &trick (301), Falling Creek (205), Five Forks (210), Gates (201), Harrowgate (106), iron Bridge (1 I I), Jacobs (204), Matoaca (303), Meadowbrook (208), Nash (211), North Chester (104), S. Manchester (308), Salem

Church (209), South Chester (102), Southside (213), Spring Run (316), St. Lukes (212), Wells (107), Winfrees Store (304), and Winterpock (306) Precincts; part of Isle of Wight County comprised of the Camps Mill (502), Carrsville (503), Courthouse (401), Orbit (403), Pons (302), Raynor (505), Smithfield (101), Walters (501), Windsor (402), and Zuni (504) Precincts and parts of the Bartlett (201), Carrollton (202), and Rushmere (301) Precincts, part of Prince George County comprised of the Courts Bldg (204), Jefferson Park (205), Richard Bland (101), Templeton (102), and Union Branch (103) Precincts and part of the Rives (104) Precinct; and parr of the City of Suffolk comprised of the Airport (401), Chuckatuck (202), Cypress Chapel (303), Driver (102), Elephants Fork/Westhaven (603), Holland (502), Hollywood (701), Holy Neck (503), John F. Kennedy (302), Kilby's Mill (501), King's Fork (203), Lake Cahoon (504), Lakeside (601), Nansemond River (703), Olde Towne (602), Southside (403), Whaleyville (402), White Marsh (301), and Yeates (705) Precincts and parts of the Bennetts Creek (104), Ebenezer (201), and Harbour View (103) Precincts.

Fifth. All of Albemarle, Appomattox, Brunswick, Buckingham, Campbell, Charlotte, Cumberland, Fluvanna, Franklin, Greene, Halifax, Lunenburg, Madison, Mecklenburg, Nelson, Pittsylvania, Prince Edward, and Rappahannock Counties: all of the Cities of Bedford, Charlottesville, and Danville; part of Bedford County comprised of the Bedford Christian Church (703), Bedford County PSA (302), Bethesda Methodist Church (303), Body Camp Elem School (204), Chamblissburg First Aid Bldg (103), Goode Rescue Squad (701), Goodview Elem School (101),

Hardy Fire & Rescue Bldg (102), Huddleston Elem School (305), Liberty High School (702), Moneta Elem School (203), Saunders Grove Brethren Church (604), Saunders Vol Fire Dept (205), Shady Grove Baptist Church (602), Staunton River High School (202), and Thaxton Elem School (603) Precincts and part of the New London Academy (301) Precinct: part of Fauquier County comprised of the Airlie (202), Baldwin Ridge (203), Broad Run (503), Casanova (103), Courthouse (201), Kettle Run (101), Leeds (402), Marshall (401), New Baltimore (502), Opal (105), The Plains (501), Warrenton (204), and Waterloo (403) Precincts and part of the Remington (302) Precinct; and part of Henry County comprised of the Axon (302), Irisburg (303), Mountain Valley (305), Mountain View (405), and Ridgeway #1 (603) Precincts and part of the Mount Olivet (304) Precinct.

Sixth. All of Amherst, Augusta, Bath, Botetourt, Highland, Page, Rockbridge, Rockingham, Shenandoah, and Warren Counties; all of the Cities of Buena Vista, Harrisonburg, Lexington, Lynchburg, Roanoke, Staunton, and Waynesboro; part of Bedford County comprised of the Big Island Elem School (502), Boonsboro Elem School (505), Boonsboro Ruritan Club (506), Forest Elem School (401), Forest Youth Athletic Assoc. (304), Knights Of Columbus Bldg (403), Montvale Elem School (601), Odd Fellows Hall (504), Pleasant View (507), Sedalia Center (503), Suck Springs (704), and Thomas Jefferson Elem School (402) Precincts and part of the New London Academy (301) Precinct; and part of Roanoke County comprised of the Bonsack (402), Burlington (202), Castle Rock (305), Cave Spring (503), Clearbrook (505), Cotton Hill (501), Garst Mill (300) Hollins

(206), Hunting Hills (507), Lindenwood (405), Mount Pleasant (406), Mount Vernon (506), Mountain View (203), North Vinton (403), Oak Grove (304), Ogden (504), Orchards (205), Penn Forest (502), Plantation (201), Poages Mill (302), South Vinton (404), and Windsor Hills (303) Precincts.

Seventh. All of Culpeper, Goochland, Hanover, Louisa, New Kent, and Orange Counties: part of Chesterfield County comprised of the Beaufont (513), Belgrade (508), Belmont (206), Black Heath (511), Bon Air (505), Brandermill (403), Cranbeck (509), Crestwood (502), Davis (515), Evergreen (312), Genito (402), Greenfield (506), Harbour Pointe (401), Huguenot (501), La Prade (405), Manchester (409), Midlothian (503), Monacan (407), Providence (404); Reams (408), Robious (504), Salisbury (507), Shenandoah (413), Skinquarter (309), Smoketree (406), Swift Creek (V I), Sycamore (510), Tomahawk (310), Wagstaff (410), Watkins (514), and Woolridge (313) Precincts; part of Henrico County comprised of the Belmont (203), Brookland (204), Byrd (401), Canterbury (205), Causeway (301), Cedarfield (302), Chamberlayne (207), Coalpit (101), Crestview (303), Derbyshire (402), Dumbarton (102), Freeman (403), Gayton (404), Glen Allen (103), Glenside (104), Godwin (405), Greendale (105), Greenwood (210), Hermitage (106), Hilliard (107), Hollybrook (212), Hungary (213), Hungary Creek (116), Hunton (108), lnnsbrook (304), Jackson Davis (305), Johnson (109), Lakeside (110), Lakewood (406), Lauderdale (407), Longan (111), Longdale (214), Maude Trevvett (112), Maybeury (408), Monument Hills (306), Moody (216), Mooreland (409), Mountain (217), Nuckols Farm (307), Oakview (218), Pemberton (410), Pinchbeck

(411), Pocahontas (308), Randolph (219), Ridge (309), Ridgefield (412), Rivers Edge (317), Rollingwood (413), Sadler (310), Shady Grove (311), Short Pump (318), Skipwith (312), Spottswood (414), Springfield (313), Staples Mill (113), Stoney Run (314), Stratford Hall (221), Summit Court (114), Three Chop' (315), Tuckahoe (415), Tucker (316), Wellborn (417), West End (416), Westwood (115), and Yellow Tavern (223) Precincts; part of Spotsylvania County comprised of the Belmont (501), Blaydes Corner (102), Brock (505), Brokenburg (502), Chancellor (204), Courthouse (504), Elys Ford (201), Fairview (703), Frazers Gate (402), Massaponax (104), Ni River (203), Partlow (101), Piedmont (603), Salem (601), Smith Station (602), Todd's Tavern (503), Travelers Rest (103), and Wilderness (202) Precincts and part of the Lee Hill (403) Precinct; and part of the City of Richmond comprised of the 101 (101), 102 (102), 104 (104), 105 (105), 106 (106), 111 (111), 112 (112), 309 (309), 409 (409), 410 (410), 412 (412), and 413 (413) Precincts and part of the 404 (404) Precinct.

Eighth. All of Arlington County; all of the Cities of Alexandria and Falls Church; and part of Fairfax County comprised of the Alban (623), Baileys (501), Belle Haven (601), Belleview (602), Belvoir (619), Bren Mar (526), Brook Hill (5.21), Bucknell (604), Bush Hilt (401), Cameron (402), Chesterhrook (302), Clermont (423), Crestwood (415), Edsall (527), El Nick (305), Fairfield (413), Fort Buffalo (703), Fort Hunt (605), Franconia (404), Garfield (417), Glen Forest #2 (529), Glen Forest (505), Graham (705), Greenway (706), Grosvenor (624 Groveton (405), Gunston (616), Haycock (307), Hayfield (406), Hollin Hall (606), Holmes #1 (506), Huntington (607),

Huntley (424), island Creek (427), Kingstowne (421), Kirby (310), Kirkside (608), Lane (419), Leewood (531), Lincolnia (507), Longfellow (312), Lorton (617), Lorton Center (625), Lorton Station (622), Lynbrook (418), Marian (609), Marshall (708), Mount Eagle (408), Parklawn (510), Pimmit (315), Pine Spring (710), Pioneer (409), Poe (523), Rose Hill (410), Salona (316), Saratoga (626), Sherwood (610), Shreve (711), Skyline (520), Stratford (611), Timber Lane (713), Van Dorn (422), Villages (420), Virginia Hills (411), Walnut Hill # 1 (525), Walnut Hill # 2 (7.28), Waynewood (612), Westgate (613), Westhampton (317), Westlawn (515), Westmoreland (318), Weyanoke (516), Whitman (614), Whittier (524), Willston (517), Wilton (425), Woodlawn (627), and Woodley (615) Precincts, and pans of the Magarity (726) and Saint Albans (513) Precincts.

Ninth. All of Alleghany, Bland, Buchanan, Carroll, Craig, Dickenson, Floyd, Giles, Grayson, Lee, Montgomery, Patrick, Pulaski, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe Counties; all of the Cities of Bristol, Covington, Galax, Martinsville, Norton, Radford, and Salem; part of Henry County comprised of the Bassett No. 1 (501), Bassett No. 2 (101), Collinsville Number 1 (401), Collinsville Number 2 (404), Daniel's Creek (402), Dyers Store (505), Fieldale (201), Figsboro (50.2), Fontaine (601), Gunville (162), Hillcrest (602), Horsepasture #1 (202), Horsepasture #2 (203), Oak Level (504), Ridgeway #2 (604), Scott's Tanyard (103), Spencer (204), and Stanleytown (503) Precincts and part of the Mount Olivet (304) Precinci; and part of Roanoke County comprised of the Bennett Springs (107), Bent Mountain (301), Botetourt Springs (204),

Catawba (101), Glenvar (103), Green Hill (106), Mason Valley (102), Northside (104), Peters Creek (105), and Wildwood (108) Precincts.

Tenth. All of Clarke, Frederick, and Loudoun Counties; all of the Cities of Manassas, Manassas Park, and Winchester; part of Fairfax County comprised of the Brookfield (902), Bull Run (923), Chain Bridge (301), Churchill (303), Clearview (321), Clifton (803), Colvin (330), Cooper (304), Cub Run (903), Deer Park (921), Dulles (904), Fairfax Station (805), Forestville (322), Fountainhead (895), Fox Mill (229), Franklin (905), Great Falls (306), Greenbriar West (847), Hickory (3.28), Kenmore (309), Kinross (908), Langley (311), Lees Corner (920), Lees Corner West (927), McLean (319), Navy (911), Newgate North (849), Newgate South (854), Popes Head (841), Poplar Tree (9.28), Rocky Run (913), Sangster (838), Seneca (329), Shouse (323), Silverbrook (839), South Run (850), Spring Hill (331), Stone (917), Sugarland (327), Vale (914), Virginia Run (915), Waples Mill (916), and Woodyard (815) Precincts and parr of the Old Mill (925) Precinct; and part of Prince William County comprised of the Alvey (406), Battlefield (402), Buckhall (103), Bull Run (403), Evergreen (401), Mountain View (410), Pace West (412), Parkside (105), Pr. William A (000), and Signal Hill (114) Precincts and part of the Buckland Mills (110) Precinct.

Eleventh. 411 of the City of Fairfax: part of Fairfax County comprised of the Aldrin (234), Barcroft (502), Belvedere (503), Blake (701), Bonnie Brae (126), Bristow (10.2), Burke (801), Burke Centre (12 7), Camelot (522), Cameron Glen (238), Cardinal (128), Centerpointe (844), Centre Ridge (901),

Centreville (918), Chapel (104), Cherry Run (825), Columbia (518), Coppermine (239), Dogwood (220), Eagle View (853), Fair Oaks (848), Fairfax A (0700), Fairlakes (843), Fairview (105), Flint Hill (202), Floris (203), Freedom Hill (704), Frying Pan (235), Glade (223), Green Trails (919), Greenbriar East (846), Greenspring (426), Heritage (106), Herndon #1 (319), Herndon #2 (320), Herndon #3 (324), Holmes #2 (530), Hummer (519), Hunr (624), Hunters Woods (221), Hutchison (325), Irving (827), Keene Mill (129), Kilmer (733), Kings Park (108), Lake Braddock (118), Laurel (119), Laurel Hill (6.28), London Towne East (910), London Towne West (924), Long Branch (122), Mantua (707), Masonville (508), McNair (237), Merrifield (721), Monument (852), Mosby (709), Newington (618), North Point (233), North Springfield # 1 (110), North Springfield # 2 (111), Nottoway (729), Oak Hill (113), Oak Marr (732), Oakton (727), Olde Creek (109), 0lley (124), Orange (824), Parkway (842), Penderbrook (730), Pine Ridge (718), Pohick (811), Powell (926), Price (711), Ravensworth (115), Ravenwood (511), Reston #1 (208), Reston #2 (209), Reston #3 (222), Ridgelea (528), Robinson (123), Sideburn (120), Signal Hill (125), Sleepy Hollow (512), South County (629), South Lakes (224), Stenwood (719), Stuart (236), Sunrise Valley (227), Terra Centre (130), Terraset (225), Thoreau (720), Tyson (731), Valley (812), Vienna til (213), Vienna #2 (214), Vienna #4 (216), Vienna #6 (218), Villa (121), Wakefield (116), Walker (714), West Springfield (840), Westbriar (219), 011ie Oaks (833), Willow Springs (851), Wolftrap (226), Woodburn (717), and Woodson (117) Precincts and parts of the Magarity (726), Old Mill (925), and Saint Albans

(513) Precincts; and part of Prince William County comprised of the Be! Air (606), Belmont (701), Bethel (506), Seville (205), Chinn (507), Civic Center (604), Dale (601), Dumfries (301), Enterprise (608), Featherstone (704), Freedom (609), Godwin (603), Graham Park (303), Kerrydale (607), Kilby (707), King (206), Library, (702), Lynn (703), Minnieville (605), Mohican (505), Neabsco (602), Occoquan (502), Old Bridge (503), Potomac (302), Potomac View (705), Rippon (706), River Oaks (708), Rockledge (504), Saunders (201), Springwoods (508), and Swans Creek (311) Precincts.

2. That § 24.2-302.1 of the Code of Virginia is repealed.

s/ _____
President of the Senate

s/ _____
Speaker of the House of Delegates

Approved:
s/ _____
Governor

The General Assembly of Virginia

_____
Clerk of the House of Delegates
and Keeper of the Rolls of the
Commonwealth

Attachment 2

§ 24.2-302.1. Congressional districts.

A. There shall be eleven Virginia members of the United States House of Representatives elected from eleven congressional districts and each district is entitled to representation by one representative.

B. All references in this section to counties and cities shall be interpreted to refer to those in existence on April 1, 2001, and as reported by the United States Bureau of the Census in the 2000 Census reports provided pursuant to United States Public Law § 94-171, notwithstanding subsequent boundary changes by law, annexation, merger, consolidation, or the voiding of boundary changes theretofore made final.

C. Parts of counties and cities listed in subsection D are defined by reference to the 2000 Census reports for the precincts, parts of precincts, and blocks listed for each congressional district in the Statistical Report on file with the Clerk of the Senate for the Act of Assembly containing the final enactment of this section.

D. The eleven congressional districts are:

First. All of Essex, Gloucester, King and Queen, King George, King William, Lancaster, Mathews, Middlesex, Northumberland, Richmond, Stafford, Westmoreland, and York Counties; all of the Cities of Fredericksburg, Poquoson, and Williamsburg; part of Caroline County comprised of the Bowling Green, Port Royal, Woodford, and Mattaponi Precincts; part of Fauquier County comprised of the Kettle Run, Catlett, Casanova, Lois, Morrisville, Remington, Opal, and Waterloo Precincts and part of the Baldwin Ridge Precinct; part of James City County comprised

of the Berkeley A, Berkeley B, Jamestown A, Jamestown B, Jamestown C, Powhatan A, Powhatan B, Stonehouse A, Stonehouse B, Roberts A Part 1, and Roberts A Part 2 Precincts and part of the Roberts B Precinct; part of Prince William County comprised of the Dumfries, Potomac, Graham Park, Quantico, Washington-Reid, and Rippon Precincts; part of Spotsylvania County comprised of the Travelers Rest, Grange Hall, Plank Road, Summit, Frazers Gate, Salem, Battlefield, and Brent's Mill Precincts and part of the Maury Precinct; part of the City of Hampton comprised of the Kraft, Magruder, Northampton, and Tucker Capps Precincts and part of the Burbank Precinct; and part of the City of Newport News comprised of the Richneck, Windsor, Boulevard, Christopher Newport, Watkins, Hidenwood, Palmer, Saunders, Yates, Kiln Creek, Beaconsdale, Sedgefield, and South Morrison Precincts and parts of the Deep Creek, Hilton, Riverside, and Warwick Precincts.

Second. All of Accomack and Northampton Counties; all of the City of Virginia Beach; part of the City of Hampton comprised of the Lasalle, Phoebus, River, Syms, Wythe, Booker, Buckroe, Fox Hill, Kecoughtan, Langley, and Phillips Precincts and part of the Burbank Precinct; and part of the City of Norfolk comprised of the Northside, Titustown Center, Zion Grace, Canterbury, Crossroads, Larchmont Library, Larchmont Recreation Center, Therapeutic Center, Wesley, Azalea Gardens, Barron Black, Easton, Fairlawn, Houston, Bayview School, Bayview United, East Ocean View, Larrymore, Little Creek, Ocean View School, Oceanair, Tarrallton, Third Presbyterian, Ocean View Center Part 1, and

Ocean View Center Part 2 Precincts and part of the St. Andrew's Precinct.

Third. All of Charles City, New Kent, and Surry Counties; all of the City of Portsmouth; part of Henrico County comprised of the Adams, Central Gardens, East Highland Park, Fairfield, Ratcliffe, Maplewood, Cedar Fork, Chickahominy, Donahoe, Eanes, Elko, Fairmount, Glen Echo, Highland Springs, Laburnum, Masonic, Town Hall, Montrose, Pleasants, Sandston, Seven Pines, Sullivans, Mehfoud, Whitlocks, Nine Mile, Dorey, and Antioch Precincts; part of Isle of Wight County comprised of part of the Rushmere Precinct; part of James City County comprised of part of the Roberts B Precinct; part of Prince George County comprised of the Blackwater, Brandon, Courts Bldg, and Bland Precincts and part of the Jefferson Park Precinct; part of the City of Hampton comprised of the Aberdeen, Bassette, City Hall, Cooper, East Hampton, Lee, Pembroke, Phenix, Smith, Tarrant, Forrest, Jones, Mallory, and Tyler Precincts; part of the City of Newport News comprised of the Denbigh, Epes, Jenkins, Mcintosh, Oyster Point, Reservoir, Lee Hall, Bland, Charles, Grissom, Nelson, Sanford, Riverview, Briarfield, Carver, Chestnut, Downtown, Dunbar, Huntington, Jefferson, Magruder, Marshall, New Market, Newsome Park, Reed, River, Washington, and Wilson Precincts and parts of the Deep Creek, Hilton, Riverside, and Warwick Precincts; part of the City of Norfolk comprised of the Granby, Tucker House, Ghent Square, Immanuel, Lafayette Library, Lafayette Presbyterian, Lambert's Point, Maury, Ohef Sholom, Park Place, Stuart, Suburban Park, Willard, Ballentine, Tanner's Creek,

Bowling Park, Coleman Place School, Lafayette-Winona, Lindenwood, Monroe, Norview Methodist, Norview Recreation Center, Rosemont, Sherwood School, Union Chapel, Berkley, Brambleton, Campostella, Chesterfield, Coleman Place Presbyterian, Hunton Y, Ingleside, Poplar Halls, Young Park, Sherwood Rec Center Part 1, and Sherwood Rec Center Part 2 Precincts and part of the St. Andrew's Precinct; and part of the City of Richmond comprised of the 113, 114, 203, 204, 206, 207, 208, 211, 212, 213, 303, 304, 305, 306, 309, 402, 403, 501, 502, 503, 504, 505, 508, 509, 510, 602, 603, 604, 606, 607, 608, 609, 610, 701, 702, 703, 704, 705, 706, 707, 802, 806, 807, 810, 811, 812, 813, 902, 903, 906, and 911 Precincts and part of the 910 Precinct.

Fourth. All of Amelia, Dinwiddie, Greensville, Nottoway, Powhatan, Southampton, and Sussex Counties; all of the Cities of Chesapeake, Colonial Heights, Emporia, Franklin, Petersburg, Suffolk, and Hopewell; part of Brunswick County comprised of the Alberta, Danieltown, Elmore, and Seymour Precincts and part of the King's Store Precinct; part of Chesterfield County comprised of the Bellwood, South Chester, Enon, North Chester, Drewry's Bluff, Harrowgate, Wells, Ecoff, Point of Rocks, Dutch Gap, Iron Bridge, Gates, Beulah, Bird, Falling Creek, Meadowbrook, Salem Church, Five Forks, Ettrick, Deer Run, Matoaca, Winfrees Store, Beach, Winterpock, Walthall, Branches, Bailey Bridge, and Spring Run Precincts and parts of the Jacobs and Pocahontas 307/Crenshaw 308 Precincts; part of Isle of Wight County comprised of the Smithfield, Carrollton, Pons, Courthouse, Windsor, Orbit, Walters, Camps Mill, Carrsville, and Zuni Precincts

and part of the Rushmere Precinct; and part of Prince George County comprised of the Richard Bland College, Templeton, Union Branch, and Rives Precincts and part of the Jefferson Park Precinct.

Fifth. All of Albemarle, Appomattox, Buckingham, Campbell, Charlotte, Cumberland, Fluvanna, Franklin, Greene, Halifax, Lunenburg, Mecklenburg, Nelson, Pittsylvania, and Prince Edward Counties; all of the Cities of Bedford, Charlottesville, Danville, and Martinsville; part of Bedford County comprised of the Stewartsville, Hardy, Chamblissburg, Staunton River, Moneta, Mountain View, Otter Hill, Walton's Store, White House, Huddleston, Shady Grove, Thaxton, Goode, Liberty High School, and Sign Rock Precincts; part of Brunswick County comprised of the Brodnax, Rock Store, Tillman, Dromgoole, Edgerton, Fitzhugh, Sturgeon, and Lawrenceville Precincts and part of the King's Store Precinct; and part of Henry County comprised of the Axton, Irisburg, Mount Olivet, Mountain Valley, Collinsville 1, Daniels Creek, Collinsville 2, Mountain View, Figsboro, Stanleytown, Oak Level, Dyers Store, and Ridgeway Precincts and part of the Fontaine Precinct.

Sixth. All of Amherst, Augusta, Bath, Botetourt, Highland, Rockbridge, Rockingham, and Shenandoah Counties; all of the Cities of Buena Vista, Harrisonburg, Lexington, Lynchburg, Roanoke, Salem, Staunton, and Waynesboro; part of Alleghany County comprised of the Humpback Bridge, Dolly Ann, Callaghan, and Griffith Precincts; part of Bedford County comprised of the New London, Forest, Jefferson, Cove, Big Island, Sedalia, Kelso, Boonsboro, and Montvale Precincts; and part of

Roanoke County comprised of the Green Hill, Plantation, Burlington, Mountain View, Bonsack, Hollins, Poages Mill, Windsor Hills, Garst Mill, Oak Grove 304/Castle Rock 305, North Vinton, South Vinton, Lindenwood, Mount Pleasant, Cotton Hill, Penn Forest, Cave Spring, Ogden, Clearbrook, Mount Vernon, and Hunting Hills Precincts and part of the Glenvar Precinct; and part of the City of Covington, comprised of the Precinct 1-1 and parts of the 2-1 and 3-1 Precincts.

Seventh. All of Culpeper, Goochland, Hanover, Louisa, Madison, Orange, Page, and Rappahannock Counties; part of Caroline County comprised of the Madison and Reedy Church Precincts; part of Chesterfield County comprised of the Belmont, Chippenham, Skinquarter, Tomahawk, Evergreen, Woolridge, Genito, Brandermill, Providence, Lyndale, Smoketree, Monacan, Reams, Manchester, Wagstaff, Davis, Harbour Pointe 401/Swift Creek 411, Huguenot, Crestwood, Midlothian, Robious, Bon Air, Greenfield, Salisbury, Cranbeck, Sycamore, Shenandoah, Beaufont, Watkins, and Belgrade 508/Black Heath 511 Precincts and parts of the Jacobs and Pocahontas 307/Crenshaw 308 Precincts; part of Henrico County comprised of the Brookland, Dumbarton, Glen Allen, Glenside, Greendale, Hermitage, Hilliard, Hunton, Johnson, Lakeside, Longan, Maude Trevvett, Moody, Staples Mill, Stratford Hall, Summit Court, Azalea, Bloomingdale, Brook Hill, Canterbury, Chamberlayne, Glen Lea, Greenwood, Highland Gardens, Hungary, Longdale, Randolph, Upham, Wilkinson, Yellow Tavern, Chipplegate, Landmark, Cardinal, Coalpit, Crestview, Freeman, Innsbrook, Jackson Davis,

Lauderdale, Monument Hills, Ridge, Sadler, Cedarfield, Skipwith, Three Chopt, Tucker, Westwood, Causeway, Stoney Run, Byrd, Lakewood, Derbyshire, Gayton, Godwin, Maybeury, Mooreland, Pemberton, Pinchbeck, Ridgefield, Rollingwood, Spottswood, Tuckahoe, and West End Precincts; part of Spotsylvania County comprised of the Partlow, Blaydes Corner, Belmont, Brokenburg, Todd's Tavern, and Holbert Precincts and part of the Maury Precinct; and part of the City of Richmond comprised of the 101, 102, 103, 104, 105, 106, 111, 112, 301, 302, 307, 308, 404, 409, 410, 411, 412, 413, 908, and 909 Precincts and part of the 910 Precinct.

Eighth. All of Arlington County; all of the Cities of Alexandria and Falls Church; part of Fairfax County comprised of the Reston #1, Reston #2, Westbriar, Dogwood, Hunters Woods, Reston #3, Glade, South Lakes, Terraset, Wolftrap, Sunrise Valley, North Point, Aldrin, Pimmit, Bush Hill, Cameron, Franconia, Groveton, Mount Eagle, Pioneer, Rose Hill, Virginia Hills, Beulah, Villages, Kingstowne, Van Dorn, Hayfield 406/Woodlawn 412/Fairfield 413, Baileys, Glen Forest, Lincolnia, Parklawn, Westlawn, Weyanoke, Willston, Skyline, Whittier, Walnut Hill #1, Bren Mar, Edsall, Belle Haven, Belleview, Bucknell, Hollin Hall, Huntington, Kirkside, Marian, Sherwood, Belvoir, Grosvenor, Fort Buffalo, Graham, Greenway, Marshall, Pine Spring, Shreve, Timber Lane, Woodburn, Magarity, Walnut Hill #2, and Tysons Precincts and parts of the Holmes and Westhampton Precincts.

Ninth. All of Bland, Buchanan, Carroll, Craig, Dickenson, Floyd, Giles, Grayson, Lee, Montgomery, Patrick, Pulaski, Russell, Scott, Smyth, Tazewell,

Washington, Wise, and Wythe Counties; all of the Cities of Bristol, Clifton Forge, Galax, Norton, and Radford; part of Alleghany County comprised of the Arritt, Dameron, Low Moor, Jackson Heights Part 1, Jackson Heights Part 2, Iron Gate, and Peters Switch Precincts; part of Henry County comprised of the Bassett 2, Gunville, Scott's Tanyard, Fieldale, Horsepasture, Spencer, Bassett 1, and Hillcrest Precincts and part of the Fontaine Precinct; part of Roanoke County comprised of the Catawba, Mason Valley, Northside, Peters Creek, Bennett Springs, Botetourt Springs, Woodlands, and Bent Mountain Precincts and part of the Glenvar Precinct; part of the City of Covington comprised of the 4-1 and 5-1 Precincts and parts of the 2-1 and 3-1 Precincts; and Montgomery A.

Tenth. All of Clarke, Frederick, Loudoun, and Warren Counties; all of the Cities of Winchester, Manassas and Manassas Park; part of Fairfax County comprised of the Colvin, Fox Mill, Floris 203/Frying Pan 235, Chain Bridge, Chesterbrook, Churchill, Cooper, El Nido, Great Falls, Haycock, Kenmore, Kirby, Langley, Longfellow, Mclean, Salona, Westmoreland, Herndon #1, Herndon #2, Clearview, Forestville, Shouse, Herndon #3, Hutchison, Stuart, Sugarland, Hickory, Seneca, Centre Ridge, Chantilly, Dulles, Franklin, Greenbriar East, Greenbriar West, Kinross, London Towne, Navy, Rocky Run, Virginia Run, Lees Corner, Deer Park, and Cub Run 903/Stone 917 Precincts and part of the Westhampton Precinct; part of Fauquier County comprised of the Warrenton, Marshall, Leeds, Upperville, The Plains, New Baltimore, and Broad Run Precincts and part of the Baldwin Ridge

Precinct; and part of Prince William County comprised of the Buckhall, Parkside, Jackson, Evergreen, Loch Lomond, Sinclair, Stonewall, Sudley, Westgate, Catharpin, Bull Run, Plantation, and Mullen Precincts.

Eleventh. All of the City of Fairfax; part of Fairfax County comprised of the Bristow, Chapel, Fairview, Heritage, Kings Park, Olde Creek, North Springfield #1, North Springfield #2, North Springfield #3. Oak Hill, Ravensworth, Wakefield, Lake Braddock, Laurel, Sideburn, Villa, Long Branch, Robinson, 011ey, Signal Hill, Bonnie Brae, Flint Hill, Vienna #1, Vienna #2, Vienna #4, Vienna #6, Crestwood, Garfield, Lynbrook, Barcroft, Belvedere, Masonville, Ravenwood, Sleepy Hollow, Saint Albans, Columbia, Hummer, Brook Hill, Camelot, Poe, Ridgelea, Fort Hunt, Stratford, Waynewood, Westgate, Whitman, Woodley, Gunston, Lorton, Newington, Delong, Pohick Run, Blake, Freedom Hill, Mantua, Mosby, Price, Walker, Pine Ridge, Stenwood, Thoreau, Merrifield, Oakton, Nottoway, Penderbrook, Oak Marr, Burke, Cardinal, Clifton, Fairfax Station, Keene Mill, Pohick, Valley, Woodyard, Orange, Cherry Run, Irving, Saratoga, Terra Centre, White Oaks, Hunt, Burke Centre, Sangster, Silverbrook, West Springfield, Popes Head, Parkway, Leehigh, Newgate, Vale, Waples Mill, Centreville, Green Trails, Willow Springs, Woodson Part 1, and Woodson Part 2 Precincts and part of the Holmes Precinct; part of Prince William County comprised of the Brentsville, Armory, Nokesville, Linton Hall, Woodbine, Park, Saunders, Enterprise, Coles, Mccoart, Springwoods, King, Lodge, Westridge, Pattie, Henderson, Montclair, Haymarket, Lake

Ridge, Occoquan, Old Bridge, Rockledge, Mohican, Bethel, Chinn, Dale, Neabsco, Godwin, Civic Center, Minnieville, Bel Air, Kerrydale, Belmont, Library, Lynn, Featherstone, Potomac View, and Kilby Precincts; and Fairfax A.

(2001, Sp. Sess. I, c. 7.)

Attachment 3

STATEMENT OF CHANGE

Chapter 1 of the Acts of Assembly of 2012 (hereafter Chapter 1) revises Virginia's 11 congressional districts. Virginia's population grew at a rate of 13 percent, from 7,079,030 to 8,001,024, between 2000 and 2010. The pattern of growth was uneven across the Commonwealth, as illustrated in the attached map (Exhibit A) showing percent change in population by locality between 2000 and 2010.

Chapter 1 accommodates these population shifts and takes into account the variety of criteria and factors that traditionally shape the legislature's redistricting decisions. Each congressional district was altered both to bring the district itself into conformity with population criteria and to facilitate necessary changes in adjoining districts.

POPULATION CHANGE BY REGION

Virginia's population increase of 921,994 was concentrated in the outer suburban and exurban rings of Northern Virginia and, secondarily, along the Interstate 64 corridor running from the suburban Hampton Peninsula to the Charlottesville area. These areas account for an increase of 741,158, or 80 percent, of the overall state growth.

The largest increases in population are found in the suburban arc around the older Northern Virginia metropolitan core. Loudoun, Prince William, and Stafford Counties, along with the smaller Cities of Manassas and Manassas Park surrounded by Prince William, experienced an overall 52 percent growth rate. The increase of 307,085 accounts for one-third of the state's total population growth. The older core

of the Northern Virginia region (Arlington County, City of Alexandria, and Fairfax County and the small Cities of Fairfax and Falls Church that it surrounds) continued to gain population (144,866), but its rate of growth, 11 percent, lagged slightly behind the state's overall growth rate.

As population continued to push out from the Northern Virginia core, the next adjoining set of "exurban" localities likewise experienced heavy growth. An overall growth rate of almost 30 percent (28.8 percent) increased the state's population by 103,401 in, from north to south, Frederick, Clarke, Fauquier, Culpeper, Orange, Spotsylvania, Caroline, and King George Counties and including the Cities of Fredericksburg and Winchester.

The corridor along Interstate 64 from the North Hampton Roads suburbs to Charlottesville, skirting the Richmond metropolitan core, with a 21.1 percent overall growth rate, likewise added 84,838 to the state's total growth. (This corridor includes, from east to west, York, James City, New Kent, Hanover, Goochland, Louisa, Fluvanna, and Albemarle Counties and the Cities of Charlottesville and Williamsburg.) One additional area of growth to be noted consists of the two large counties encircling the City of Richmond. Chesterfield and Henrico Counties combined to add 100,968 in population, a growth rate of 19.3 percent.

The situation for the major cities of Hampton Roads is in contrast with the growth of the Northern Virginia and Richmond metropolitan regions. Chesapeake, Norfolk, Portsmouth, and Virginia Beach in South Hampton Roads and Hampton and

Newport News in North Hampton Roads combined for a growth rate of only 2.3 percent. Portsmouth and Hampton actually lost population over the last decade. Above average growth in the adjoining suburban jurisdictions (James City and York Counties and the City of Williamsburg in the North and the City of Suffolk and Isle of Wight County in the South) could not offset the overall lag for the entire metropolitan region.

As can be seen on the Exhibit A map, most rural localities and smaller metropolitan areas in the rest of the state grew at rates below the state average, or in some instances actually lost population, over the last decade. The populations of most of the state's 39 cities increased between 2000 and 2010, but only seven experienced growth exceeding the state average. In addition to the smaller cities cited above in the high growth areas, Harrisonburg and Lynchburg had moderately higher growth and the suburban Hampton Roads City of Suffolk grew at a rate of 32.8 percent.

IMPACT OF POPULATION SHIFTS ON DISTRICTS

The ideal population for a congressional district based on the 2010 Census is 727,366. The range of deviations from the ideal for the current, pre-Chapter 1 districts was extensive — from a plus 19.5 percent deviation (Tenth District) to a minus 11.2 percent deviation (Second District). No district is within one percent of ideal, and deviations in seven of the 11 districts exceed five percent. Adjustments were made to each district to eliminate the disparities in populations between the districts. A review of major

regions of the Commonwealth illustrates the impact of the 2010 Census population shifts.

Northern Virginia

As used here, Northern Virginia consists of an older central core and suburban and exurban rings. Arlington County, the City of Alexandria, and Fairfax County and the Cities of Fairfax and Falls Church are the oldest, "central" part of the greater Northern Virginia region. The components of the rapidly growing grouping of suburban and exurban localities have been listed above (see page 2.) Northern Virginia is home to three congressional districts (Eighth, Tenth, and Eleventh), and the outer suburban-exurban localities also add population to districts that stretch south and southeast to Hampton Roads (First) and the Richmond (Seventh) area.

The current Eighth, Tenth, and Eleventh Districts are, in round numbers, collectively 180,000 over the total population for three districts. Chapter 1 first equalizes population among the three districts and then moves this excess population "downstate" to underpopulated districts centered in the Hampton Roads area and in rural western and southern Virginia. The current Eighth District, primarily an inside-the-Beltway district, was 26,356 below the ideal population in 2010. Population exchanges in Fairfax County, primarily with the current Eleventh District, add the population to bring the Eighth to the ideal number in Chapter 1.

Chapter 1 moves the largest part of the excess 180,000 directly from Prince William into the First District. The Prince William component of the First

District increases from 55,000 to 167,000, a net shift of 112,000 population. Most of this population is destined for the Second-Third-Fourth District area through Hampton and Newport News, primarily to make up the Second District's population deficit.

Chapter 1 completes the downstate transfer of population in the northwest part of Northern Virginia. Warren County moves to the Sixth District and the northwest part of Fauquier County moves to the Fifth District, for a total transfer of 68,000.

Hampton Roads

The urban southeastern comer of the state is the second largest of its metropolitan regions. It includes the South Hampton Roads Cities of Chesapeake, Norfolk, Portsmouth, Suffolk, and Virginia Beach and North Hampton Roads Cities of Hampton and Newport News, bordered by several less populous counties and small cities. As noted above, this area for the second straight decade lagged dramatically behind the state's overall growth rate.

The current Second District almost exclusively is contained in this region and is the most underpopulated of the state's districts at 81,182 below the ideal size. Almost 60 percent of the Third District also is in this area. This district, the Virginia district that has an African American majority, is 63,976 below the required population. Hampton Roads also has a share of two additional districts. Almost one-half (45 percent) of the population in the Fourth District is in Hampton Roads. This district stretches west into Southside Virginia and includes African Americans as 34 percent of its population. Its 2010 population was

slightly (11,273) above ideal. Finally, the First District stretches from the Northern Virginia suburban area southeast through the rural peninsulas and into North Hampton Roads, where it picks up approximately a third of the district's population. The First covers areas of above average growth and is 58,871 over the required population. Since Chapter 1 also moves almost 112,000 from the Northern Virginia area into the First District, that district has a significant excess population to be redistributed.

Chapter 1 uses population from the First District in the Newport News-Hampton area to make up the Second District's population deficit. In round numbers, 88,000 in Newport News is shifted from the First to the Second District. Some population is exchanged between First, Second, and Third Districts to add population to the Third District, but Chapter 1 finds most of the population required to erase the Third District deficit at the western end of the district. About 35,000 in Richmond and Henrico County transfer from the Seventh District, and the City of Petersburg (39,000) moves from the Fourth to the Third District. The Fourth District is compensated primarily by the addition of 22,000 of the population of Chesterfield County from the current Seventh District.

Rural Southern and Western Virginia

The predominantly rural Fifth (southern and central Virginia), Sixth (bordering West Virginia), and Ninth (Southwest Virginia) Districts are contiguous and all are underpopulated, the total deficit being almost 136,000. The situation of the

Ninth District is most immediate, since its population deficit in 2010 was 71,166 and its geographical location demands that it add population from either the Fifth or Sixth, or both.

As noted in describing Northern Virginia, the western part of that area had excess population of approximately 68,000 that could be transferred downstate. In addition, the First District, overpopulated to begin with and boosted by the initial addition of population from Northern Virginia (Prince William) had excess population available for transfer even after providing the underpopulated Hampton Roads districts the population they required.

Chapter 1 brings the three districts under discussion up to population equality initially by extending the Fifth and Sixth Districts north to the upper Piedmont and outer Northern Virginia area for additional population, contracting the Seventh District southeast in the process. The Fifth District adds 71,000 by picking up Madison and Rappahannock Counties from the Seventh District and most (50,000) of Fauquier County from the Tenth and First Districts. The Sixth District adds Page (Seventh) and Warren (Tenth) Counties for a gain of almost 62,000. The two districts then have enough combined excess population to bring the Ninth District to the required population count. The Fifth District provides almost 33,000 by transferring the City of Martinsville and a greater part of Henry County to the Ninth. The Sixth District provides almost 37,000 by transferring the City of Salem, a larger part of Roanoke County, and the part of

Alleghany County now in the Sixth to the Ninth District.

A series of smaller adjustments along the First District-Seventh District boundary from Fauquier County to New Kent County result in a net shift of population to the Seventh and reduce the First to the ideal population.

Richmond Area

The City of Richmond and surrounding Chesterfield, Hanover, and Henrico Counties have a combined population of more than 900,000. Almost 60 percent of that population currently is in the Seventh District, with significant components included in the Third District (25 percent) and Fourth District (17 percent). Chapter 1 reduces the Seventh District component by 56,000, although the Richmond area retains a slim majority (52 percent) of the district. As described above, the population taken from the Richmond area Seventh District was used to help bring the Third District and Fourth District populations up to the required district total. Approximately 34,000 of the population in Richmond City and Henrico County is shifted to the Third District; almost 22,000 of the population of Chesterfield County is moved to the Fourth District.

APPLICATION OF TRADITIONAL REDISTRICTING CRITERIA

The Privileges and Elections Committee of the Senate (the Committee) on March 25, 2011, adopted criteria that identify the standards applied in drawing new congressional districts.

Population Equality

The Committee emphasized adherence to population equality among congressional districts. Its first redistricting criterion mirrors the Virginia Constitution's statement on population equality among districts and provides:

> ***I. Population Equality***
>
> *The population of legislative districts shall be determined solely according to the enumeration established by the 2010 federal census. The population of each district shall be as nearly equal to the population of every other district as practicable. (Senate Privileges and Elections Committee, Committee Resolution No. 2. Adopted March 25, 2011).*

Chapter 1 congressional districts all are at 0.00 percent deviation. Nine of the 11 districts have exactly the ideal population; two districts have an absolute deviation of one (1) person.

Equal Protection Clause and Voting Rights Act Considerations

The Committee adopted the following criterion on compliance with the United States Constitution and Voting Rights Act:

> ***II. Voting Rights Act***
>
> *Districts shall be drawn in accordance with the laws of the United States and the Commonwealth of Virginia including compliance with protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength. Nothing in these guidelines shall be construed to require or*

permit any districting policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965. (Senate Committee on Privileges and Elections, Committee. Resolution No. 2 Adopted March 25, 2011).

The impact of Chapter 1 on racial minority groups is discussed in detail in Attachment 5. There is one district with African American total and voting age majorities in the current plan and Chapter 1 likewise includes one majority-minority district, the Third District in both cases.

Contiguity and Compactness

The third criterion adopted by the Committee incorporated Virginia's constitutional requirement for contiguity and compactness with reference to the 1992 and 2002 cases in which the Virginia Supreme Court interpreted these constitutional standards.

III. Contiguity and Compactness

Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. Public comment has been invited, has been and continues to be received, and will be considered. It is inevitable that some interests will be advanced more than others by the choice of particular district configurations. The discernment, weighing, and balancing of the varied factors that contribute to communities of

interest is an intensely political process best carried out by elected representatives of the people. Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest. (Senate Committee on Privileges and Elections, Committee Resolution No. 2. Adopted March 25, 2011).

The Court in *Jamerson* gave "proper deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment." (*Jamerson v. Womack*, 244 Va. 506, 517 (1992)). Statistical measures of compactness thus are not determinative in the Virginia context; Chapter 1 compactness scores by standard measures are nearly identical to those of the current set of districts.

Average Compactness Scores

Measure	Current Plan	Chapter 1
Roeck	0.21	0.21
Polsby-Popper	0.17	0.15
Schwartzberg	0.66	0.66

Localities, Precincts, and Communities of Interest

Chapter 1 splits 14 localities to meet the criteria adopted by the Committee, a reduction from the 19 localities split by the current congressional plan. (These totals exclude three localities in each plan that technically are split but in which the entire locality population is in one district while one or more

water blocks without population are in another district.) All of the localities split by Chapter 1 are already split in the current plan, including eight large localities with populations exceeding 100,000 (Chesterfield, Henrico, Fairfax and Prince William Counties and the Cities of Hampton, Newport News, Norfolk, and Richmond). Chapter 1 reunites four smaller localities (Alleghany, Brunswick, and Caroline Counties and the City of Covington) and York County, which were split in the current plan.

Chapter 1 splits 10 precincts across the state to meet the criteria adopted by the Committee, a significant reduction from the 26 split precincts in the current plan. (As in the case of split localities, these numbers exclude technically split precincts where all of the precinct's population is in one district and there is no population in the other district.)

The General Assembly heard, considered, and balanced many points of view on communities of interest beyond those reflected in the communities contained in localities and precincts. Testimony and debates point out the wide variety of competing communities of interest, including those defined by geographic features such as mountain ranges and valleys, by economic character, by social and cultural attributes, and by services.

Partisan and Incumbency Considerations

As the 2011 and 2012 committee and floor transcripts reflect, respect for incumbency was taken into account in the development of Chapter 1 districts. No incumbents were placed in the same district and, with two exceptions, Chapter 1 retains 80 percent or more of the current district's core

constituency population (see Tables 1 and 2). The exceptions are the Eleventh District with 29 percent new population and the First District with 24 percent new population.

The election history reports for the current plan and Chapter 1 show that the vote in Virginia's congressional districts aligns strongly with one or the other major political party (See Table 3). Chapter 1 alterations to the districts caused little or no change in the projected vote in about half the districts. Where the vote projects do change at least somewhat measurably, notable is the reduced Republican vote in the Eleventh (by five to six percent) and Third (by three percent) Districts. On the other hand, the Republican vote is projected to increase by one to two percent in Fourth, Seventh, and Tenth Districts and one percent in the Eighth District.

Chapter 1 was reported from the Privileges and Elections Committee by a 19 to 3 vote. All 14 Republicans, joined by an Independent who caucuses with the Republicans, voted to report. The votes of the seven Democratic members were split, four voting for and three against reporting HB 251. The ensuing floor vote on passage of the bill showed the same pattern. All 64 Republicans who voted favored passage, as did the lone Independent member. Democrats were divided. Nine voted in favor of passage, while a majority (twenty-one members) of the caucus voted against the bill. Two Democrats did not vote.

Votes in the Senate followed party lines. Eight Republicans voted in favor and seven Democrats opposed the motion to report the bill from the Senate

Privileges and Elections Committee. The floor vote on final passage showed all 20 Republicans in favor, all 19 Democrats who voted were opposed, and one Democrat did not vote.

The 2012 voting patterns followed those on congressional measures during the 2011 Special Session of the General Assembly. House Bill 251 in 2012 was identical to the version of House Bill 5004 that passed the House of Delegates at the 2011 Special Session. (The bill as passed by the House was identical to the introduced version except for a minor adjustment to unsplit one voting precinct.) The House Privileges and Elections Committee reported House Bill 5004 by a 17 to 2 vote, with three members not voting. All 11 Republicans who voted favored the bill; two did not vote. Five Democrats voted in the affirmative, while two were opposed and one did not vote. The floor vote on passage, 71 to 23 with six members not voting, reflected a similar pattern. All but four Republicans voted to pass the bill; two voted against passage and two did not vote. The two Independents, who caucused with the Republicans, also voted in favor of the bill. A majority (21) of Democrats opposed the bill, while 14 voted in the affirmative and four did not vote.

The Senate Privileges and Elections Committee replaced the House redistricting plan with the plan of Senate Bill 5004 (Locke) by removing the House language in House Bill 5004 and inserting the Locke bill's language in its place. The bill was reported from committee, rereferred to committee from the floor, and reported again by the committee as a substitute with some additional changes. All nine Democrats voted to report the bill on both votes. No

Republicans supported either version: All six voted against on the first vote; two did not vote on the second occasion while the other four were recorded in opposition. The floor vote on the Senate version of House Bill 5004 was divided by party. All 22 Democrats voted in favor of passage, while, among Republicans, 15 opposed it and three did not vote. The House of Delegates rejected the Senate version of the bill, effectively ending 2011 consideration of redistricting. No House Republican supported the Senate version; 51 voted against and eight did not vote. One of the two Independents likewise opposed the measure and one did not vote. Among Democrats, 30 voted for the Senate version, four opposed it, and five did not vote.

Attachment 3

Table 1
Chapter One Districts
Components of Population Adjustments

District	2010 Total	Retained	%	Transferred	Added	Ch. 1 Total
1	786,327	556,094	76%	230,143	171,272	727,366
2	646,184	618,267	85%	27,917	109,099	727,366
3	663,390	604,608	83%	58,782	122,758	727,366
4	738,639	699,949	96%	38,690	22,417	727,366
5	685,859	652,915	90%	32,944	74,450	727,365
6	704,056	665,671	92%	38,385	61,695	727,366
7	757,917	640,903	88%	117,014	86,463	727,366
8	701,010	621,050	85%	79,960	106,316	727,366
9	656,200	656,122	90%	78	71,244	727,366
10	869,437	648,661	89%	220,776	78,704	727,366
11	792,095	518,160	71%	273,935	209,206	727,365

Table 2
Chapter One Districts
Core Constituency Report

District: 1

Total Population: **727,366**
Voting Age Population: **543,139**

Unchanged Area			
Population from District	1	**556,094**	**422,033**
Total Unchanged Area		**556,094**	**422,033**
From Other Districts			
Population from District	3	**7,351**	**5,106**
Population from District	7	**14,481**	**10,797**
Population from District	10	**38,187**	**28,023**
Population from District	11	**111,253**	**77,180**
Total From Other Districts		**171,272**	**121,106**
Total for District: 1		**727,366**	**543,139**

District: 2

Total Population: **727,366**
Voting Age Population: **565,464**

Unchanged Area			
Population from District	2	**618,267**	**479,697**
Total Unchanged Area		**618,267**	**479,697**
From Other Districts			
Population from District	1	**83,598**	**65,718**
Population from District	3	**25,501**	**20,049**
Total From Other Districts		**109,099**	**85,767**
Total for District: 2		**727,366**	**565,464**

District: 3

Total Population: **727,366**
Voting Age Population: **560,158**

Unchanged Area			
Population from District	3	**604,608**	**466,232**
Total Unchanged Area		**604,608**	**466,232**
From Other Districts			
Population from District	1	**23,288**	**17,805**
Population from District	2	**27,917**	**20,543**
Population from District	4	**35,447**	**27,835**
Population from District	7	**36,106**	**27,743**

Total From Other Districts		122,758	93,926
Total for District:	**3**	**727,366**	**560,158**

District: 4

Total Population: **727,366**
Voting Age Population: **547,486**

Unchanged Area			
Population from District	4	699,949	527,298
Total Unchanged Area		699,949	527,298
From Other Districts			
Population from District	3	5,713	4,176
Population from District	7	21,704	16,012
Total From Other Districts		27,417	20,188
Total for District:	**4**	**727,366**	**547,486**

District: 5

Total Population: **727,365**
Voting Age Population: **574,341**

Unchanged Area			
Population from District	5	652,915	517,503
Total Unchanged Area		652,915	517,503
From Other Districts			
Population from District	1	19,595	14,600
Population from District	4	3,243	2,609
Population from District	6	85	56
Population from District	7	20,681	16,246
Population from District	10	30,846	23,327
Total From Other Districts		74,450	56,838
Total for District:	**5**	**727,365**	**574,341**

District: 6

Total Population: **727,366**
Voting Age Population: **572,702**

Unchanged Area			
Population from District	6	665,671	525,297
Total Unchanged Area		665,671	525,297
From Other Districts			
Population from District	5	0	0
Population from District	7	24,042	18,849
Population from District	9	78	61
Population from District	10	37,575	28,495

Total From Other Districts		61,695	47,405
Total for District:	**6**	**727,366**	**572,702**

District: 7

Total Population: **727,366**
Voting Age Population: **549,562**

Unchanged Area			
Population from District	7	640,903	486,679
Total Unchanged Area		640,903	486,679
From Other Districts			
Population from District	1	66,246	46,887
Population from District	3	20,217	15,996
Total From Other Districts		86,463	62,883
Total for District:	**7**	**727,366**	**549,562**

District: 8

Total Population: **727,366**
Voting Age Population: **580,212**

Unchanged Area			
Population from District	8	621,050	502,331
Total Unchanged Area		621,050	502,331
From Other Districts			
Population from District	10	22,338	16,217
Population from District	11	83,978	61,664
Total From Other Districts		106,316	77,881
Total for District:	**8**	**727,366**	**580,212**

District: 9

Total Population: **727,366**
Voting Age Population: **584,877**

Unchanged Area			
Population from District	9	656,122	528,070
Total Unchanged Area		656,122	528,070
From Other Districts			
Population from District	5	32,944	26,093
Population from District	6	38,300	30,714
Total From Other Districts		71,244	56,807
Total for District:	**9**	**727,366**	**584,877**

District: 10

Total Population: **727,365**
Voting Age Population: **520,811**

Unchanged Area			
Population from District	10	648,661	463,505
Total Unchanged Area		648,661	463,505
From Other Districts			
Population from District	8	0	0
Population from District	11	78,704	57,306
Total From Other Districts		78,704	57,306
Total for District: 10		727,365	520,811

District: 11

Total Population: **727,366**
Voting Age Population: **548,595**

Unchanged Area		518,160	390,215
Population from District	11		
Total Unchanged Area		518,160	390,215
From Other Districts			
Population from District	1	37,416	25,897
Population from District	8	79,960	62,763
Population from District	10	91,830	69,720
Total From Other Districts		209,206	158,380
Total for District: 11		727,366	548,595

Table 3
Chapter One Districts
Projected Republican Vote

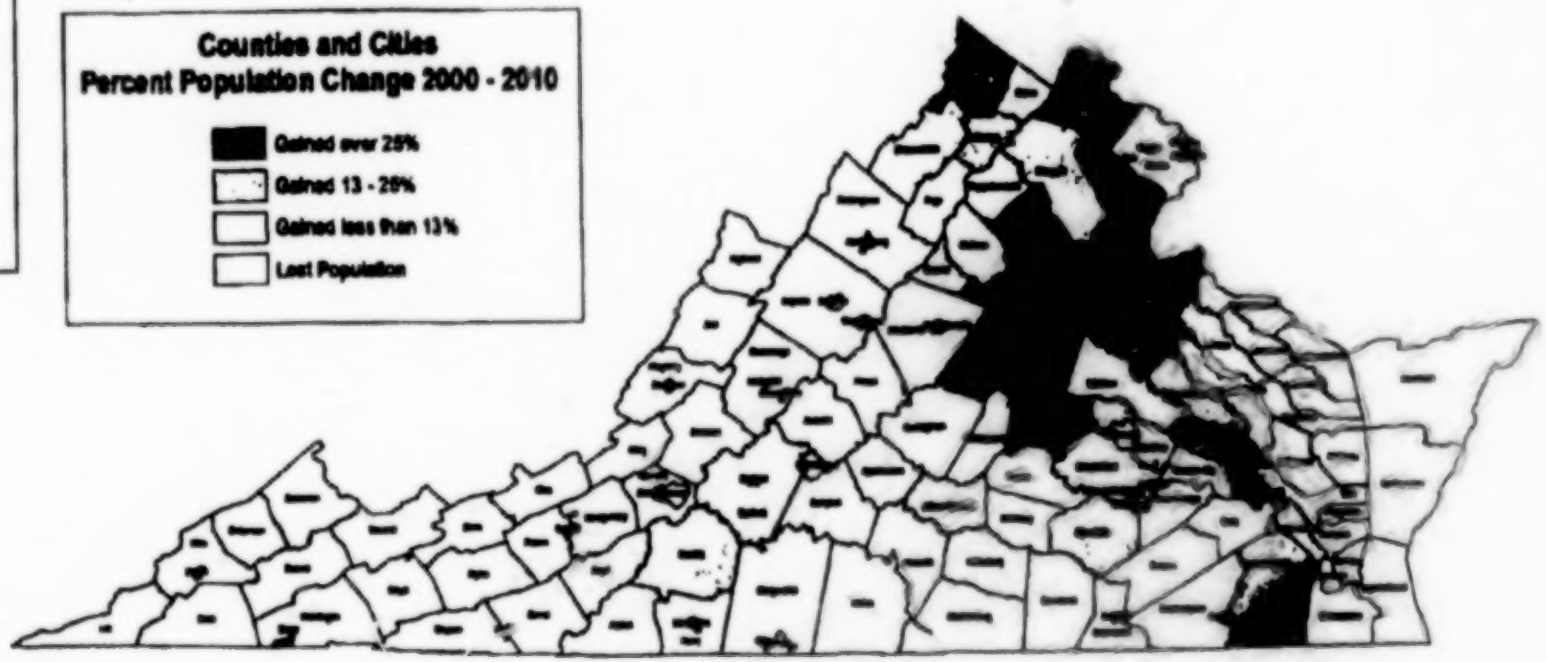
Current Districts Chapter 1 Districts

District	2009 Governor	2008 President	2009 Governor	2008 President
1	65%	53%	66%	53%
2	62%	50%	62%	50%
3	34%	25%	31%	22%
4	61%	50%	63%	51%
5	61%	52%	62%	52%
6	67%	58%	67%	58%
7	66%	54%	68%	56%
8	39%	32%	40%	33%
9	67%	59%	66%	59%
10	61%	48%	63%	50%
11	55%	44%	50%	38%

The vote by census block first was estimated from known precinct election returns. The values for each census block in a district then were summed to produce an estimated district vote for each candidate.

Commonwealth of Virginia

EXHIBIT A



Attachment 4

Approved 3/25/11

SENATE COMMITTEE ON PRIVILEGES AND ELECTIONS

COMMITTEE RESOLUTION

NO. 2 – Congressional District Criteria

(Proposed by Senator Howell)

RESOLVED, That after consideration of legal requirements and public policy objectives, informed by public comment, the Senate Committee on Privileges and Elections adopts the following criteria for the redrawing of Virginia's Congressional districts:

I. Population Equality

The population of legislative districts shall be determined solely according to the enumeration established by the 2010 federal census. The population of each district shall be as nearly equal to the population of every other district as practicable.

II. Voting Rights Act

Districts shall be drawn in accordance with the laws of the United States and the Commonwealth of Virginia including compliance with protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength. Nothing in these guidelines shall be construed to require or permit any districting policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965.

III. Contiguity and Compactness

Districts shall be comprised of contiguous territory including adjoining insular territory. Contiguity by water is sufficient. Districts shall be contiguous and compact in accordance with the Constitution of Virginia as interpreted by the Virginia Supreme Court in the cases of *Jamerson v. Womack*, 244 Va. 506 (1992) and *Wilkins v. West*, 264 Va. 447 (2002).

IV. Single-Member Districts

A11 districts shall be single-member districts.

V. Communities of Interest

Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. Public comment has been invited, has been and continues to be received, and will be considered. It is inevitable that some interests will be advanced more than others by the choice of particular district configurations. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people. Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest.

VI. Priority

All of the foregoing criteria shall be considered in the districting process, but population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the criteria. Where the application of any of the foregoing criteria may cause a violation of applicable federal or state law, there may be such deviation from the criteria as is necessary, but no more than is necessary, to avoid such violation.

Attachment 5

CONGRESSIONAL REDISTRICTING PLAN

STATEMENT OF ANTICIPATED MINORITY IMPACT

The current congressional district plan includes the Third District in which African-Americans constitute a 56.8 percent majority of the total population and a 53.2 percent majority of the voting age population. The Fourth District includes the second highest percentage of African-Americans, who constitute 33.6 percent of the total population and 32.3 percent of the voting age population of that District.

Table 5.1 presents information relating to demographic changes in these two districts between 2000 and 2010 and the effect of Chapter 1 on the minority total and voting age percentages in these districts. Chapter 1 complies with the requirements of Section 5 of the United States Voting Rights Act by retaining minority strength in the redrawn Third District comparable to the minority strength of the current Third District under the 2010 Census.

Minority Population Trends

Virginia's African-American population increased from 1,390,293 to 1,551,399 between 2000 and 2010, a growth rate of 11.6 percent and a percentage change from 19.6 percent to 19.4 percent of the total population. Under the 2010 Census option of identifying oneself by more than one race, the total number who identified as African-American only or as African-American and some other combination was 1,653,563 or 20.7 percent of the total population. (The data used by the General Assembly in

redistricting allocated those who included White as part of their multiple race identity to the minority race group. The data used in the following analysis are based on this allocation.)

The African-American population grew at a slower rate than the overall state average (11.6 percent compared to 13 percent). The attached analysis by the Weldon Cooper Center for Public Service of the University of Virginia succinctly summarizes the patterns of growth of the African-American population throughout the decade. Briefly, the distribution of African-Americans in Virginia has been relatively constant during the last decade, with the African-American population being concentrated in the eastern half of the state.

These patterns are reflected in the statistics for the current Congressional districts and had implications for drawing the new districts. As Table 5.1 demonstrates, below average growth left the Third District significantly below ideal district size. The Third District gained less than 20,000 persons and was short of the ideal district size by 63,976 persons.

As in 2000, the most dramatic change in Virginia's demographic base, mirroring national patterns, was the increase in Hispanic population. The Hispanic population increased from 4.7 percent of the state population in 2000 to 7.9 percent in 2010, representing a gain of over 302,285 people and a growth rate of 91.7 percent. While virtually every locality showed some growth in Hispanic population, the majority of that population is concentrated in Northern Virginia. Over one-quarter of the total Hispanic population is in Fairfax County, with the

adjoining localities also showing significant percentages of Hispanic population. Two current congressional districts (Districts 8 and 11) contain more than 15 percent Hispanic population, both of which are located in Northern Virginia. No current congressional district contains more than 20 percent Hispanic population. In Chapter 1, Districts 8 and 11 both still contain more than 15 percent Hispanic population, with the Hispanic population increasing in both districts. No congressional district in Chapter 1 contains more than 20 percent Hispanic population.

Asians make up 5.5 percent of Virginia's population, up from 3.7 percent, and increasing from 261,025 to 439,890 between 2000 and 2010 at a growth rate of 68.5 percent. The Asian population is most heavily concentrated in Northern Virginia and tends to be fairly evenly distributed throughout the region rather than concentrated. Two current congressional districts (Districts 8, and 10) contain more than 10 percent Asian population and one district (District 11) contains more than 15 percent, all of which are located in Northern Virginia. No current congressional district contains more than 20 percent Asian population. In Chapter 1, Districts 8 and 10 both still contain more than 10 percent Asian population, with the population decreasing slightly in District 10 and increasing slightly in District 8. In Chapter 1, District 11 still contains more than 15 percent Asian population, with the Asian population increasing. No current congressional district contains more than 20 percent Asian population.

The Majority African-American District

Chapter 1 maintains one majority minority district in Virginia. The shortfall in population in the Third District is offset by shifting the whole City of Petersburg from the Fourth to the Third district. Additional population from the Cities of Hampton, Norfolk, and Richmond and the County of Henrico also shift to the Third. New Kent County is shifted from the Third District to the Seventh and fewer people from the City of Newport News and the Counties of New Kent and Prince George are assigned to the Third District.

The Fourth District gains population primarily in Chesterfield and Prince George Counties to offset the loss of Petersburg, and it retains a significant African American population and a majority of its present component parts.

The resulting population statistics shown in Table 5.1 reflect the need to add territory so as to meet equal population requirements and the non-retrogression requirements of Section 5. Other factors came into play in the shaping of these districts, including communities of interest, incumbency, and political considerations. As Table 5.1 shows, Chapter 1 adjustments to the Third and Fourth Districts to add territory to the Third District result in an increase in the total and voting age African-American populations by 3.3 percent and 3.2 percent, respectively, and both total and voting age populations are increased to over 55 percent each. The same adjustments result in slight reductions from the total and voting age population figures in the Fourth District of 2 percent and 2.2 percent,

respectively. However, both figures remain over 30 percent and retain significant influence for African Americans in the Fourth District.

Alternative Plans

In addition to Chapter 1, four plans were presented to the General Assembly during its Special Session on redistricting held during 2011. The first plan, House Bill 5004, was introduced by William R. Janis. This plan is identical to the plan contained in Chapter 1.

There were also three alternative plans presented during the Special Session on redistricting.

The first alternative plan, Senate Bill 5003 was introduced by Senator John C. Miller. The districts in Senate Bill 5003 were drawn by students at the College of William and Mary and this plan was one of the winning plans in the Virginia College and University Redistricting Competition. Table 5.1 includes the relevant information with regard to the anticipated impact of this plan. Briefly, in Senate Bill 5003, like Chapter 1, the Third District retained a majority African-American total population; however, the configuration of the districts is different. The total and voting age African-American populations in the majority minority district are 7.1 percent and 6.2 percent less, respectively, than in Chapter 1, and the total and voting age African-American populations are both below 55 percent. In the district with the second highest percentage of African-American population, the total and voting age African-American populations are 2.5 percent and 1.5 percent higher, respectively, than in Chapter 1.

The second alternative plan, Senate Bill 5004, was introduced by Senator Mamie E. Locke. Table 5.1 includes the relevant information with regard to the anticipated impact of this plan. Briefly, this plan, like Chapter 1, contained one majority African-American district, though this district shifted from the Third District to the Fourth. The Third District, under this plan, included the second highest percentage of African-American population. The configurations of the Third and Fourth Districts in this plan are essentially a reconfiguration of the current Third and Fourth Districts. The total and voting age African-American populations in the majority minority district are 6.0 percent and 5.2 percent less, respectively, than in Chapter 1, and the total and voting age African-American populations are both below 55 percent. In the district with the second highest percentage of African-American population, the total and voting age African-American populations are 12.2 percent and 10.3 percent higher, respectively, than in Chapter 1.

The third alternative plan consists of substitute bills for Senate Bill 5004 and House Bill 5004 adopted in the Senate, which were identical. Table 5.1 includes the relevant information with regard to the anticipated impact of this plan. Briefly, this plan, like Chapter 1, contained one majority African-American district, though this district shifted from the Third District to the Fourth. The Third District, under this plan, included the second highest percentage of African-American population. The configurations of the Third and Fourth Districts in this plan are essentially a reconfiguration of the current Third and Fourth Districts. The total and

voting age African-American populations in the majority minority district are 6.5 percent and 5.5 percent less, respectively, than in Chapter 1, and the total and voting age African-American populations are both below 55 percent. In the district with the second highest percentage of African-American population, the total and voting age African-American populations are 12.6 percent and 10.8 percent higher, respectively, than in Chapter 1.

Chapter 1 was introduced as House Bill 251 by Delegate Robert B. Bell during the 2012 Regular Session of the General Assembly after the General Assembly was unable to pass a plan during the 2011 Special Session on redistricting. An identical Senate bill, Senate Bill 455, introduced by Senator Jill Holtzman Vogel, was reported out of the Senate Privileges and Elections Committee. Chapter 1 passed both houses primarily with Republican support. Six of the 13 Democratic African-American Delegates voted for Chapter 1, with the remaining seven voting against it. None of the five Democratic African-American Senators voted for Chapter 1.

Attachment 5-C – Table 5.1

Comparison Table: Virginia Congressional Districts – Majority Minority and Influence Districts Current District

Current District	Current District 2000 TPOP	Current District 2000 TPOP Black Percent	Current District 2000 VAP Black Percent	Current District 2010 TPOP	Current District 2010 Actual Deviation	Current District 2010 Percent Deviation	Current District TPOP Black Percent	Current District VAP Black Percent	CH.1/ HB 5004 District TPOP Black Percent
3	643,476	56.8	53.2	663,390	-63,976	-8.8	56.2	53.1	59.5
4	643,477	33.6	32.3	738,639	+11,273	1.5	34.4	33.5	32.4
5									

Attachment 5-C – Table 5.1

Comparison Table: Virginia Congressional Districts – Majority Minority and Influence Districts Current District

Current District	CH.1/ HB 5004 District VAP Black Percent	SB 5003 TPOP Black Percent	SB 5003 VAP Black Percent	SB 5004 TPOP Black Percent	SB 5004 VAP Black Percent	HB 5004 Sub./ SB 5004 Sub. TPOP Black Percent	HB 5004 Sub./ SB 5004 Sub. VAP Black Percent
3	56.3	52.4	50.1	44.6	41.6	45.0	42.1
4	31.3	***	***	53.5	51.1	53.0	50.8
5		34.9	32.8				

Attachment 5-C – Table 5.2

Senate of Virginia Majority Minority District Changes

District 3 — Additions:	more of Hampton	+ 32,941
	more of Henrico County	+ 14,550
	more of Isle of Wight County (additional split precincts with 0 population added)	+ 0
	more of Norfolk	+ 5,765
	Petersburg	+ 32,420
	more of Richmond City	+ 19,768
	part of Suffolk (split precincts with 0 population added)	+ 0
Subtractions:	New Kent County	- 18,429
	part of Newport News	- 20,090
	part of Prince George County	- 2,686
	remainder of York County	- 263
		727,366
District 4 — Additions:	more of Chesterfield County	+ 21,704
	more of Prince George County	+ 2,686
Subtractions:	remainder of Brunswick County	- 3,243
	part of Isle of Wight County (split precincts	0

	with 0 population moved to District 3)	
	part of Suffolk (split precincts with 0 population moved to District 3)	0
	Petersburg	- 32,420
		727,366

Attachment 5

2010 Census Brief
Spotlight on Virginia's African American Population

February 22 - The United States Census Bureau recently released local level 2010 Census population counts, including data on race. This brief provides a snapshot of Virginia's black and African American population on April 1, 2010:

- Black/African American remains the largest minority group in Virginia. More than 1.5 million Virginia residents reported themselves to be black or African American, accounting for nearly 20 percent of the total population.
- The distribution of the black population across the commonwealth has been relatively stable over the past three decades. Blacks are concentrated in the Eastern half of the state while the Valley and Southwest regions have much smaller black populations.
- Norfolk and Richmond have the largest black populations (exceeding 100,000), while Petersburg city has the largest percentage of blacks (79 percent). Richmond lost nearly 10,000 (or 8.6 percent) of its black population between 2000 and 2010, the largest decease in the commonwealth.

Percent of Population That Is Black or African American, April 1, 2010

Top Five Localities with the Largest Number of Black Residents		To Five Localities with the Largest Percentage of Black Residents	
Norfolk City	104,672	Petersburg City	79.1%
Richmond City	103,342	Emporia City	62.5%
Fairfax County	99,218	Greensville County	59.8%
Henrico	90,669	Sussex County	58.1%
Virginia Beach City	85,935	Brunswick County	57.3%

This is one of a series of Census Briefs prepared by the Demographics & Workforce Group of the University of Virginia's Weldon Cooper Center for Public Service. For more information and related data tables, visit our website at www.coopercenter.org/demographics.

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U.Va. Assesses 2010 Census Data on Virginia's Asian Population

March 2, 2011 — The latest census brief from the University of Virginia's Weldon Cooper Center for Public Service highlights census data on people of Asian origin living in Virginia.

The center continues its efforts to make 2010 U.S. Census results, released last month, more accessible and user-friendly.

- As of April 1, 2010, almost 440,000 Virginia residents were Asian, accounting for 5.5 percent of the total population. This constitutes a 69 percent increase since 2000.
- Nine out of every 10 Asians lived in Virginia's three major metropolitan areas: Northern Virginia (71 percent), Hampton Roads (13 percent) and Richmond (9 percent). High concentrations of Asians were also found in college and university communities such as Charlottesville, Williamsburg, Harrisonburg and Lynchburg cities and York, Montgomery, Albemarle and Roanoke counties.
- More than two-thirds of Virginia's Asians were U.S. citizens: 28 percent were native citizens; 40 percent were born outside of the U.S. and naturalized; and 32 percent were foreign-born noncitizens.
- The top five birth countries of Virginia's foreign-born Asians were India, Korea, Philippines, Vietnam and China.

Birthplaces of Virginia's Asian Population, April 1, 2010

Localities with the Largest Number of Asian Residents		Localities with the Largest Percentage of Asian Residents	
Fairfax Co.	189,661	Fairfax Co.	17.5%
Loudoun	46,033	Fairfax city	15.2%
Prince William	30,317	Loudoun	14.7%
Virginia Beach	26,769	Arlington	9.6%
Henrico	20,052	Falls Church	9.4%

This is one of a series of Census Briefs prepared by the Demographics & Workforce Group of the Cooper Center. For information and related data tables, visit its website at www.coopercenter.org/demographics.

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U.Va. Assesses 2010 Census Data on Virginia's Hispanic Population

February 16, 2011 — Continuing efforts to make 2010 U.S. Census data more accessible and user-friendly, demographers at the University of Virginia's Weldon Cooper Center for Public Service have assessed the data on recently released local-level 2010 population counts, including data on people of Hispanic origin living in Virginia.

Here are highlights of Virginia's Hispanic population as of April 1, 2010:

- More than 630,000 Virginia residents were of Hispanic origin, accounting for nearly 8 percent of the total population. This constitutes a 92 percent increase since 2000.
- Sixty-two percent of the commonwealth's Hispanics live in Northern Virginia. At the same time, areas such as Culpeper, James City and Orange counties and Suffolk city, which had few Hispanics in 2000, now have sizable Hispanic populations.
- Fifty-three percent of Hispanics in Virginia are native citizens. Thirteen percent of Hispanics were born abroad and became naturalized citizens of the U.S.; and 34 percent of Hispanics are foreign-born non-citizens.
- Most of Virginia's foreign-born Hispanics were born in El Salvador, Mexico, Peru, Bolivia and Guatemala.

Percent of Population That Is Hispanic, April 1, 2010

Localities with the Largest Number of Hispanic Residents		Localities with the Largest Percentage of Hispanic Residents	
Fairfax Co.	168,482	Manassas Park city	32.5%
Prince William Co.	81,460	Manassas city	31.4%
Loudoun Co.	38,576	Prince William Co.	20.3%
Arlington Co.	31,382	Alexandria city	16.1%
Virginia Beach city	28,987	Fairfax city	15.8%

This is one of a series of Census Briefs prepared by the Demographics & Workforce Group of the Cooper Center. For information and related data tables, visit its website at www.coopercenter.org/demographics.

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U.Va. Assesses 2010 Census Data on Virginia's Multi-Racial Population

March 9, 2011 — Continuing their efforts to make 2010 U.S. Census data more accessible and user-friendly, demographers at the University of Virginia's Weldon Cooper Center for Public Service have assessed the data on recently released local-level 2010 population counts, including data on people of two or more races living in Virginia.

"The 2010 Census data reflects increasing diversity in the country, and in Virginia," said Qian Cai, director of the Cooper Center's Demographics & Workforce group. "This year, with redistricting under way in Virginia, current information on racial and ethnic heritage is of particular importance for insuring fairness in defining districts."

Here are highlights of Virginia's multi-race population as of April 1, 2010:

- More than 233,000 Virginia residents, or 2.9 percent of the population, reported that they belong to two or more of the six race categories counted in the federal census: white; black or African-American; American Indian and Alaska native; Asian; Native Hawaiian and other Pacific Islander; or some other race. (Note: People of Hispanic origin may be of any race. Hispanic ethnicity is reported in response to a different census question.)
- This is an increase from the 2000 census — the first year in which people could identify themselves as multi-racial — when 2 percent of the population reported that they belonged to two or more races.

- Most multi-racial Virginians reported belonging to just two races; only about 19,000 people reported belonging to three or more. Of the biracial Virginians, 29 percent reported being white and black; 28 percent white and Asian; and the remainder other combinations of the six race categories.
- Multi-racial Virginians tend to live in metropolitan areas, particularly Northern Virginia and Hampton Roads. Manassas Park has the highest percentage of multi-racial residents at 5.4 percent.

Localities with the Largest Number of Multi-Race Residents		Localities with the Largest Percentage of Multi-Race Residents	
Fairfax Co.	43,915	Manassas Park city	5.4%
Prince William Co.	20,500	Prince William County	5.1%
Virginia Beach city	17,656	Manassas City	4.3%
Loudoun Co.	12,575	Newport News	4.3%
Norfolk	8,825	Fairfax County	4.1%

This is one of a series of Census Briefs prepared by the Demographics & Workforce Group of the Cooper Center. For information and related data tables, visit its website at www.coopercenter.org/demographics.

Attachment 6

STATEMENT IDENTIFYING PAST OR PRESENT LITIGATION CONCERNING THE CHANGE OF RELATED VOTING PRACTICES

Present and Recent Litigation

A number of cases were filed before the congressional redistricting process concluded. None of the cases relates to the substance of the redistricting plans. Two are pending; two have been resolved.

On November 16, 2011, six Virginia voters filed suit against various members of the Virginia State Board of Elections (the Board), the Board, the Governor of Virginia, the Lieutenant Governor of Virginia and the Attorney General of Virginia in the United States District Court for the Eastern District of Virginia in a case styled *LaMarca v. Virginia State Board of Elections*, No. 1:11cv1255 (E.D. Va. Nov. 16, 2011). The plaintiffs state that the Virginia constitution's text that notes that apportionment shall occur in 2011 means that the General Assembly forfeited its right to reapportion by failing to redistrict in 2011. Plaintiffs further argue that the 2001 congressional districting plan, as amended and currently in use, now includes constitutionally malapportioned districts. Plaintiffs then assert that defendants planned to use the malapportioned congressional districts for the 2012 congressional elections. Consequently, plaintiffs request both that the court declare the 2001 congressional districting plan invalid and that the court draft its own redistricting plan. A number of motions, including the Commonwealth's motion to dismiss, are scheduled to be heard on February 10, 2012.

On November 18, 2011, six Virginia voters filed suit against various members of the Virginia State Board of Elections (the Board), the Board, the Governor of Virginia, the Lieutenant Governor of Virginia and the Attorney General of Virginia in a case styled *Little v. Virginia State Board of Elections*, Case No. 760CL11005253 (Richmond City Circuit Court). The plaintiffs in *Little* made nearly identical arguments to those made by the plaintiffs in *LaMarca v. Virginia State Board of Elections*, noted above. They argue that the General Assembly has forfeited its right to redistrict having failed to do so in 2011. Plaintiffs request that the court deem the malapportioned districts unconstitutional and draw new congressional districts to be used in the 2012 elections. On December 12, 2011, the Office of the Attorney General moved to dismiss the case arguing, in part, that the General Assembly had ample time to pass a redistricting plan in time for 2012 congressional elections to be held. On January 24, the court denied the Commonwealth's Motion to Dismiss ruling that the Virginia constitution requires that reapportionment occur in 2011, but declining to decide whether the General Assembly's failure to redistrict in 2011 means that the General Assembly has forfeited its right to do so.

As noted above, two other cases related to congressional redistricting have been resolved. On April 19, 2011, three voters filed suit in the United States District Court for the Eastern District of Virginia against various members of the Virginia State Board of Elections in a case styled *Burch v. Virginia Board of Elections*, No. 3:11-cv-256 (E.D. Va., April 19, 2011). Plaintiffs in this case alleged

that the 2010 Census results made clear that the House of Delegates, state Senate, and congressional districts constructed in the wake of the 2000 Census had become malapportioned. They further claimed that holding elections based on the 2001 districting lines would be unconstitutional. Plaintiffs argued that their constitutional rights were at risk because the General Assembly likely would not pass a redistricting plan that would be precleared in time to hold elections with properly apportioned districts. On May 2, 2011, the Office of the Attorney General of Virginia filed a motion to dismiss the suit noting, in part, that it is not reasonably plausible that the Commonwealth would hold elections based on post-2000 Census districts and that the General Assembly had ample time to pass a congressional redistricting plan and have it precleared before the 2012 elections. On June 15, 2011, the court dismissed the complaint.

On April 19, 2011, three plaintiffs filed suit in *Klotz v. Commonwealth of Virginia*, Case No. 085CL11000638-00 (Hanover Circuit Court, April 19, 2011). They noted that the General Assembly had not passed a state legislative or congressional districting plan and suggested that the Commonwealth would hold elections based on the districting plan that had been in use since 2001. Consequently, they asked that the court stop the Commonwealth from using the 2001 districting lines for state legislative elections and congressional elections. A notice of removal to the United States District Court for the Eastern District of Virginia was filed on April 22, 2011. On May 10, 2011, the court accepted the parties' joint stipulation of dismissal of the case.

Pursuant to 28 C.F.R. § 51.19, the Office of the Attorney General of Virginia will notify and provide the Chief, Voting Section, Civil Rights Division, Department of Justice, with copies of any pleadings subsequently received that commence litigation concerning the change in House of Delegates Districts.

Past Litigation

In the wake of the 2000 Census, the General Assembly redistricted the Commonwealth's congressional districts. The congressional districting plan (HB 18) was signed by Virginia Governor James Gilmore III on July 19, 2001. The districting plan was precleared by the Department of Justice on October 16, 2001. The plan was subsequently challenged in court on § 2 grounds. The case was ultimately disposed of in *Hall v. Virginia*, 385 F3d 421 (4th Cir. 2004), when the court affirmed the district court's dismissal of the complaint for failure to state a claim.

Many technical and substantive changes to the Code of Virginia have been made regarding elections and voting procedures since the Commonwealth last redistricted congressional districts after the 2000 Census. The most significant change was the decennial redistricting of state legislative districts in 2011 (HB 5005). The law was submitted for preclearance on May 11, 2011, and the Department of Justice sent its preclearance notification on June 17, 2011.

Attachment 4

Approved 3/25/11

SENATE COMMITTEE ON PRIVILEGES AND ELECTIONS COMMITTEE RESOLUTION NO. 2 – Congressional District Criteria

(Proposed by Senator Howell)

RESOLVED, That after consideration of legal requirements and public policy objectives, informed by public comment, the Senate Committee on Privileges and Elections adopts the following criteria for the redrawing of Virginia's Congressional districts:

I. Population Equality

The population of legislative districts shall be determined solely according to the enumeration established by the 2010 federal census. The population of each district shall be as nearly equal to the population of every other district as practicable.

II. Voting Rights Act

Districts shall be drawn in accordance with the laws of the United States and the Commonwealth of Virginia including compliance with protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength. Nothing in these guidelines shall be construed to require or permit any districting policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965.

III. Contiguity and Compactness

Districts shall be comprised of contiguous territory including adjoining insular territory. Contiguity by

water is sufficient. Districts shall be contiguous and compact in accordance with the Constitution of Virginia as interpreted by the Virginia Supreme Court in the cases of *Jamerson v. Womack*, 244 Va. 506 (1992) and *Wilkins v. West*, 264 Va. 447 (2002).

IV. Single-Member Districts

All districts shall be single-member districts.

V. Communities of Interest

Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. Public comment has been invited, has been and continues to be received, and will be considered. It is inevitable that some interests will be advanced more than others by the choice of particular district configurations. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people. Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest.

VI. Priority

All of the foregoing criteria shall be considered in the districting process, but population equality among districts and compliance with federal and state constitutional requirements and the Voting

Rights Act of 1965 shall be given priority in the event of conflict among the criteria. Where the application of any of the foregoing criteria may cause a violation of applicable federal or state law, there may be such deviation from the criteria as is necessary, but no more than is necessary, to avoid such violation.

Attachment 17

LEGISLATIVE HISTORY OF 2012 VIRGINIA CONGRESSIONAL DISTRICT PLAN

This Attachment provides a chronology that identifies the events, legislative actions, and proposals resulting in the enactment of House Bill 251 as Chapter 1 of the 2012 Acts of Assembly, signed by Governor Robert F. McDonnell on January 25, 2012, (hereafter Chapter 1). Chapter 1 contains the redistricting plan for the 11 congressional seats apportioned to Virginia under the 2010 Census results.

In 2005, the General Assembly began preparing for the decennial congressional and legislative reapportionment (commonly referred to as legislative redistricting) required by the Virginia Constitution, Article II, Section 6, with the Commonwealth's participation in Phases I and II of the Census Bureau's redistricting data program. The Division of Legislative Services was designated as the agency to coordinate with the Census Bureau and carry out the program. The Division operates under the general supervision of the Joint Reapportionment Committee. This bi-partisan committee represents the House of Delegates and Senate (Virginia Code §§ 30-263 through 30-265) and oversees preparations for redistricting. Participation in Phases I and II involved the review of census geography, the incorporation of Virginia's voting precincts in the Bureau's census geography, and the provision of 2010 Census redistricting data at the voting precinct level.

The second major step in preparing for redistricting was to build a geographic information

system and acquire software to enhance the system used in 2001. A key component of the computer-based redistricting system was the website maintained by the Division of Legislative Services. The Division's redistricting website was begun in 2000 and maintained throughout the decade. This website, http://redistricting.dls.virginia.gov/2010/ was expanded for the 2011-2012 redistricting process to include more sophisticated mapping options and a mechanism for the public to comment on plans as they were introduced and made public. The objective of the expanded website was to provide for the broadest and promptest dissemination of redistricting information, population and election history data, interactive maps, and redistricting proposals as they were made public. Copies of public comments made on the website were routinely distributed to the Privileges and Elections Committees.

Information available through the website to legislators and the public includes data on the current and proposed districts; interactive maps; statistical reports; block, precinct, locality, and district-level population data; and shape and block-assignment files. Notices of redistricting public hearings and transcripts of the hearings and Committee meetings are published on the redistricting website. The House and Senate Privileges and Elections Committees Redistricting Criteria resolutions and *Drawing the Line*, a publication created by the Division of Legislative Services about redistricting in Virginia, are also found on the website. In addition, there is a webpage

that contains 2010 Census data, an explanation of file formats, and free data downloads.

The Division's website was updated regularly. The events described in the following chronology were routinely posted on the website and available through the General Assembly's Legislative Information System (http://lis.virginia.gov/). The statistical reports for the congressional redistricting legislation considered by the General Assembly in its 2011 Special Session I and its 2012 Regular Session, were generated using 2010 Census population data and the precinct boundaries that were included in the 2010 Census reports.

CHRONOLOGY

2005 through 2009

The Division of Legislative Services, subject to oversight from the Joint Reapportionment Committee, participated in Phases I and II of the Census Bureau's redistricting program and began constructing the new computer redistricting system with funds appropriated in the state's biennial budgets.

April 1, 2010

Census Day.

August through December 2010

Delegate Mark L. Cole of Fredericksburg announced on **August 23, 2010**, that the redistricting subcommittee of the House of Delegates Committee on Privileges and Elections was scheduling a series of six public hearings throughout the Commonwealth in preparation for the 2011 redistricting process with a goal of encouraging broad

public input into the redistricting process. The six different public hearings took place in September, October, and December in Roanoke, Norfolk, Fairfax, Danville, Stafford, and Richmond. Transcripts of the hearings were made available on the Division's redistricting website and may be viewed in Attachment 15.

In **August 2010**, the Division published the first issue of its redistricting newsletter, *Drawing the Line 2011*, with population estimates for the current districts and background information on the redistricting process. The newsletter was mailed to members of the Virginia General Assembly and posted on the Division's website. In addition, all interested parties were provided notification by email with a link to the website.

On **September 16, 2010**, Senator Janet Howell, Chair of the Senate Committee on Privileges and Elections announced a schedule of four public hearings in Roanoke, Herndon, Portsmouth, and Richmond in October, November, and December. Transcripts of the hearings were made available on the Division's redistricting website and may be viewed in Attachment 15.

In the late fall of 2010, Christopher Newport University and the Public Mapping Project announced a 2011 Virginia College and University Legislative Redistricting Competition with a **December 15, 2010**, deadline to register. The Competition website was: http://www.varedistrictingcompetition.org/. Twelve colleges participated and 55 plans were submitted by mid-March 2011 for state legislative and

congressional districts. SB 5003 is one of the competition plans and was a first place winner in the Governor's Commission Division. It is a congressional redistricting plan and created by a William and Mary Law School team. It was introduced on April 7, 2011, by request by Senator J. C. Miller.

On **December 17, 2010**, the Joint Reapportionment Committee met in Richmond and received an update from the Division of Legislative Services on its work with the Census Bureau and its preparations for the redistricting process. The Committee adopted a resolution directing staff to continue preparations for redistricting in 2011 and authorizing the Division to proceed with necessary steps to enter into contracts for a redistricting software application and the development of a website to provide public access to the process and allow public comments on proposed redistricting plans.

January and February 2011

The General Assembly met for the 2011 Regular Session from **January 12 to February 27, 2011**, and adopted House Bill 1507 (Ch. 3, 2011 Acts of Assembly) to move the usual June 14 primary date to August 23, 2011, and allow time for enactment and Section 5 Voting Rights Act review of the redistricting plans for the House of Delegates and Senate before the November 2011 elections for those bodies. The bill passed unanimously and took effect immediately upon passage on February 17, 2011, subject to Department of Justice review that was

initiated February 24, 2011. DOJ sent their preclearance notification on March 22, 2011.

On **February 3, 2011**, Virginia received the Public Law 94-171 redistricting data from the Census Bureau, and the Division posted the data on its website along with explanatory information. The Joint Reapportionment Committee met **February 7 and 23, 2011**, for staff reports on its readiness to draw redistricting plans and provide for public access to and comments on plans.

On **February 25, 2011**, Delegate M.K. Cox introduced House Joint Resolution No. 986 applying to the Governor to call a redistricting special session to begin immediately upon adjournment of the 2011 Regular Session. Both houses agreed and the resolution took effect **February 26, 2011**. The 2011 Regular Session adjourned on Sunday, **February 27, 2011**, and on that day the Governor issued his proclamation calling for the special session. The 2011 Special Session I convened February 27 and agreed to House Joint Resolution 5002 setting the ground rules for the Special Session. The Special Session then recessed until April 4, 2011, allowing time for public hearings and the drawing of plans.

March and April 2011

The House and Senate Privileges and Elections Committees announced on **March 18, 2011**, that the committees would hold a series of eight joint public hearings around the Commonwealth on March 31, April 2, and April 4, 2011. Information on the public hearings and the 2010 populations of the then current House of Delegates, Senate, and congressional plans were posted on the redistricting

website and covered in the issue Number 2 of *Drawing the Line 2011*. Transcripts for the hearings are available on the website and in Attachment 15.

On **March 25, 2011**, the House and Senate Committees on Privileges and Elections met separately in Richmond and each adopted a committee resolution setting out the criteria that the committee would follow in reviewing redistricting plans for the House of Delegates and Senate. The Senate Committee also adopted a resolution for criteria in reviewing congressional district plans. See attachment 4. This resolution was identical to the resolution adopted July 9, 2001, by both the House and Senate Committees on Privileges and Elections with one updated reference to court cases. The House Committee held extensive discussions on the criteria for redrawing House of Delegates districts and adjourned without taking up congressional redistricting criteria.

The General Assembly placed its primary emphasis during April on the passage of redistricting plans for the House of Delegates and Senate in advance of the November 2011 election. However, beginning **April 6, 2011**, members of the General Assembly began introducing bills to redraw congressional districts and releasing congressional district plans on the Division's redistricting website.

Here is the chronology for the plans made public and for the various legislative actions taken on the congressional district plans. The parenthetical notes show the name of the plan as shown on the Division website.

April 6, 2011 Delegate Bill Janis introduced **HB 5004** and it was referred to the House Committee on Privileges and Elections. (HB 5004 - B. Janis); posted on website April 6, 2011.

April 7, 2011 Senator J.C. Miller introduced **SB 5003**, by request, and it was referred to the Senate Committee on Privileges and Elections. (SB 5003 - J .Miller (William & Mary Plan)); posted April 8, 2011. No further action was taken on SB 5003.

April 11, 2011 Senator Locke introduced **SB 5004** and it was referred to the Senate Committee on Privileges and Elections. (SB 5004 - M. Locke); posted April 11, 2011. No further action was taken on SB 5004. However, a later version of this plan was made public and subsequently placed in HB 5004 by a Senate Committee on Privileges and Elections substitute amendment for HB 5004. See, June 6 and 7, 2011, below.

April 12, 2011 The House Committee on Privileges and Elections met, adopted one technical amendment to correct a Fairfax County precinct name, and reported HB 5004 with one amendment (17-2, Delegates Alexander and Howell, A.T. voting nay). The House voted 71-23 later on April 12 to report HB 5004 with the Committee amendment and two amendments offered by Delegate Janis to reunite the Taylor Elementary School Precinct (213) of the City of Norfolk in the Third Congressional District. The House communicated the engrossed HB 5004 to the Senate where it was referred to the Senate Committee on Privileges and Elections. The Senate Committee reported (9-6) a substitute for HB 5004.

April 25 and 27, 2011 The Senate met and recommitted HB 5004 to the Senate Committee on Privileges and Elections.

May through December 2011 -

June 6 through 9, 2011 Senator Locke released a substitute for her SB 5004 (SB 5004 - M.Locke Substitute); posted June 6, 2011. On June 9, 2011, the Committee on Privileges and Elections adopted and reported (9-4) an identical substitute for HB 5004 (HB 5004 Senate Committee Substitute (6/9/11)), posted June 7, 2011. On June 9, the Senate passed the HB 5004 Committee Substitute (22-15), the House rejected the Senate substitute amendment, and HB 5004 was put into conference.

The conference committee deadlocked. There was no further action taken on HB 5004 in 2011.

January 2012

January 10, 2012 Delegate Robert B. Bell prefiled HB 251, an exact duplicate of the 2011 engrossed HB 5004 as it had passed the House of Delegates (2012 HB251 - Robert B. Bell); posted January 11, 2012.

January 11, 2012 The 2011 Special Session adjourned sine die, and the General Assembly convened the 2012 Regular Session. The House Committee on Privileges and Elections met and Delegate Bell explained that HB 251 was the same as HB 5004 (2011 Special Session I) as it had passed the House in 2011. The Committee reported HB 251 by a vote of 19-3 (Delegates Scott, Sickles, and Spruill voting no).

Senator Jill Vogel introduced SB 455, which was the same as HB 5004 as it had been introduced and

was referred to the Senate Committee on Privileges and Elections.

January 13, 2012 The House passed HB 251 by a vote of 74-21.

January 16, 2012 HB 251 was referred to the Senate Committee on Privileges and Elections.

January 17, 2012 The Senate Committee on Privileges and Elections reported HB 251 by a vote of 8-7 and reported a substitute for SB 455 also by a vote of 8-7 that conformed it to HB 251.

January 20, 2012 The Senate passed HB 251 by a vote of 20-19 and engrossed the substitute for SB 455.

January 25, 2012 Governor McDonnell signed HB 251.

See attachments 3 and 5 for analyses of Chapter 1 of the 2012 Acts of Assembly and SB 5004 (Special Session I, 2011).

Draft DLS/mrs

1/26/12

sprojects/redist/2012/submission ch 0 attachment 17

Attachment 15

VIRGINIA

SENATE COMMITTEE

On PRIVILEGES And ELECTIONS

SUBCOMMITTEE ON REDISTRICTING

PUBLIC HEARING

Thursday, November 4, 7:00 P.M.

Herndon Town Council Chambers
765 Lynn Street
Herndon, Virginia

* * *

[Page 48]

(Laughter ensues.)

THE CHAIRPERSON: I expect to get pressure from just about every elected official in this state that will be enacted.

It will be a bill. It will be just like we do our own, but they will come forward with proposals. They will come from anybody who wants to send them to us, including the congressmen themselves.

And, as I said in my probably too-long opening statement, with the congressional districts the numbers have to be almost precisely identical in every single district.

The Supreme Court is being very rigid about that. I read about a case in another state where there was a 13-vote difference between some districts and the courts disallowed that plan. So that will be a severe restraint. There can be exceptions, but it will be tight.

Yes?

MR. JERRY WELCH: It's kind of a—someone brought up a fairly good point about the 2nd, 4th, 5th and 9th Congressional Districts, but you totally bypassed the 3rd, which is kind of a monstrosity because it's been gerrymandered by, what, 90 miles of James River bottom to connect wide areas of Norfolk with the City of Richmond.

THE CHAIRPERSON: Are you talking the 3rd Senate District?

SENATOR MARTIN: The 3rd congressional.

THE CHAIRPERSON: The 3rd congressional, okay.

SENATOR MARTIN: Of which I agree completely.

MR. WELCH: Yeah, I mean, that's what—you know, everybody's sort of spoken about bipartisanship and making it fair, but packing pretty much every black community up and down the James River into one is—I don't know how they made it past the Department of Justice review in 2001.

But that's what we're talking about there. Don't slam every Democratic area in Fairfax and Arlington and Alexandria into Jim's district and then everything else downstate.

SENATOR MARTIN: I would agree with that and did not care for the 3rd, the way the 3rd was done.

MR. WELCH: Thank you.

THE CHAIRPERSON: Yes.

MR. ALEX BLAKEMORE: This is just a—I guess is a question. The handout you all handed out said there's a constitutional, I guess a Virginia constitutional mandate that the districts be compact and contiguous, but doesn't the 10th Congressional District, isn't that completely discontiguous in two parts, or is that not true?

The 8th is really gerrymandered, but.

THE CHAIRPERSON: Let me ask Mr. Cotter, who's our legal expert.

MR. COTTER: Where is it disconnected?

MR. BLAKEMORE: The 11th cuts through a big—there's like a northern part and a southern part of the 10th and then the 11th.

MR. SPIKE WILLIAMS: It wraps around the 11th.

* * *

THE COMMITTEE ON PRIVILEGES AND ELECTIONS PUBLIC MEETING

BEFORE: MARK COLE, CHAIRMAN

PLACE: COMMONWEALTH OF VIRGINIA
GENERAL ASSEMBLY BUILDING
HOUSE ROOM C
RICHMOND, VIRGINIA 23218

DATE: APRIL 11, 2011

DELEGATE JONES: Just some housekeeping real quickly. I want to point out to all the members that you have in your package a comment report distributed to all the members and it includes up until a few days ago all the comments concerning redistricting that have been submitted to the website for you all's review. And I know some of you at least have been reviewing the comments online and so I just wanted to make sure that that was available to everyone. Okay, the purpose of today's meeting is to take up, consider bills dealing with Congressional redistricting and we do have at least one plan that's been submitted that's on the docket today. And that's I believe it's House Bill 5004 and the patron is Delegate Janis. And I'll ask Delegate Janis if you would please present yourself.

DELEGATE JANIS: Thank you, Mr. Jones. House Bill 5004 is a bill to redraw the boundary lines for each of the eleven Virginia Congressional Districts, the ones that are ten-year constitutionally mandated reapportionment. The boundary lines reflected in House Bill 5004, the legislation here in front of you were drawn based on several criteria. First, the districts were drawn to conform with all mandates from the United States Constitution and the Constitution of Virginia and specifically to comply with the requirement that there be one person, one vote. This was a significant challenge given the dramatic and non-uniform shifts in population across the Commonwealth over the past ten years, most specifically the dramatic population growth in parts of Northern Virginia with corresponding population loss of parts of Southside, Southwest and even parts of the state that might

grow but don't grow at the same rate. The second criteria were districts were drawn to conform with all mandates from all applicable federal law, most notably the Urban Rights Act mandate that there be no retrogression in minority voters in the Third Congressional District and also the Zero Variance Rule that mandates that each of these eleven Congressional Districts must be drawn so that they encompass a population no fewer than 727,365 residents but no more than 727,366. So the Zero Variance means down to a one person difference in each of these eleven districts and each have more than 700,000 residents. Third, the districts are drawn with respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 Congressional elections. They're based on the core of the existing Congressional Districts with a minimal amount of change or disruption necessary consistent with the need to either expand or contract the territory of the districts based on whether they've lost population, gained population or gained population at a rate that was less than they needed in order to meet the 727,365 benchmark. The plan respects the will of the electorate by not cutting currently elected Congressmen out of the districts nor do we presume to throw currently elected Congressmen together in the districts. We try to respect the fact that November 2010, the voters spoke in each of these districts, they elected the current representatives and what we tried to do was to be respectful of where they lived and not try to lump them together or cut them out of the districts. You'll also note that the plan attempts where possible to keep jurisdictional

localities intact and to reunite where possible localities and jurisdictions which are currently fractured or splintered because of previous redistricting plans. In fact, if you look at this plan, it's [unintelligible] jurisdictions of the current Congressional District lines, three counties, the County of Allegheny, the County of Brunswick and the County of Caroline are reunited in a single Congressional District under this plan. One city, Covington, has been reunited. And I believe Martinsville and Salem are now intact as well. Wherever possible, this plan also preserves, seeks to preserve existing local communities of interest. They're smaller than a jurisdiction but are considered to be a sort of a community of interest and to reunite such communities that may have been fractured in the course of redistrict [unintelligible]. One example that comes to mind is Reston up in Northern Virginia. District boundary lines were drawn based in part on specific and detailed recommendations provided by each of the eleven currently elected Congressmen, both the Republican members and the Democrat members. And they each gave significant, specific and detailed recommendations about how they could draw the lines or the boundaries or what would make sense for their particular district in order to preserve the local communities of interest and the need to either expand or contract their district to meet the 727,365 person benchmark. I personally spoke with each member of the Virginia Congressional Delegation, both the Republican members and the Democrat members and they have each confirmed with me that the lines for their district as they are reflected in House Bill 5004

conform to the recommendations that were provided and the information that was provided by them. And each member of the delegation, both Republican and Democrat, has confirmed for me that they support the way the lines for their specific district are drawn in House Bill 5004. And so, that's basically the legislation, I'm going to answer questions. There is one, for taking questions of the Committee, I have to make one technical amendment. And if you look at page four of the bill, in the Tenth Congressional District if you look at line 206, there is a precinct in Fairfax called Lee's Corner, number 920, and you'll see right next to it is Lee's Corner West, which is 927. There seems to be some discrepancy between State Board of Elections and the local registrar but I do have something here from the Fairfax County, Virginia Electoral Board and General Register's website. They identified precinct 920 in Fairfax on their website as Lee's Corner East and then there's a 927, which is Lee's Corner West. We have identified 920 in this legislation as Lee's Corner and I think probably out of an abundance of caution that is a technical amendment that I probably would like to move at this time.

UNIDENTIFIED MALE: Second.

CHAIRMAN: Okay, there's a motion. There's a motion and a second for a technical amendment renaming or correcting the name of one of the precincts of Fairfax. Any discussion on this amendment? All those in favor of adopting the amendment say "Aye." (Ayes.) Opposed? (no response) All right, the amendment now is in force.

DELEGATE JANIS: And with that, Mr. Chairman, I stand ready to answer any questions anyone might have of me.

CHAIRMAN: Are there any questions of Delegate Janis?

UNIDENTIFIED FEMALE: Delegate Janis, you referenced that you had talked with all eleven Congressional members and they all complied or were all saying the lines, they were in agreement of these lines as drawn?

* * *

[Page 8]

UNIDENTIFIED MALE: There have been some rumors around about the consideration of a minority influence district. Can you give me any feedback on that? What's the status and can you give some consideration to that?

DELEGATE JANIS: I'm not an election lawyer. I had not heard, what we, what one of the criteria applied was today we've got Congressman Scott in the Third Congressional District. That is the only minority majority district in the delegation. Under the current Congressional lines, the Third Congressional District has a total African American population of about a 55.33%. Under these proposed lines, there's a 3.17% change. There's a 58.50% African American total population. If you want to get voting age population, there is about a 4.3% change. It goes from being 52.62% voting age to 57% voting age. So mindful that the voting rights act requires us not to retrogress that district, what these lines reflect is under the new proposed lines, we can have no less than percentages that we have under the existing

lines with the existing census data from 2011, the updated census data. So we drew the majority minority district, the Third in accordance with the Voting Rights Act. And that was basically what we did. I didn't look at drawing the other districts because one of the other criteria which I used was try not to disrupt the lines of the current districts any more than you have to given population shifts, et cetera. If you actually look at the map and then you did an overlay, I can get a graphic that would work very well. I've got one here, it's not a very good graphic and I can send some up to you but the brown line is going to be the delta or change, if you look at this, the district boundaries don't change very much under this plan and that was deliberate. So, I've heard there's some proposals about other ways you could have drawn the line. I can't speak to why it wasn't drawn that way. I can only speak to why it was drawn this way.

CHAIRMAN: All right, Delegate Spruill.

DELEGATE SPRUILL: I had talked with Congressman Scott and he has always indicated to me that he could live with a less number of [unintelligible] and I was talking about, took Petersburg, which is majority black, and put them into the Third, and made Bobby's precinct even more black than what it is. So my first question is what is the percentage of minority in Petersburg now and what is proposed?

DELEGATE JANIS: I didn't get down on a jurisdiction by jurisdiction basis. What I have are the numbers for the total African American population in the Third District under the current

lines and the total African American percentage under the proposed lines.

DELEGATE SPRUILL: That's what I want to know about, give me the Fourth first.

DELEGATE JANIS: The total African American population of the Fourth or the Third?

DELEGATE SPRUILL: The Fourth, please sir.

DELEGATE JANIS: The Fourth District. Today in the Fourth Congressional District, the total African American population is 33.66%.

DELEGATE SPRUILL: All right.

DELEGATE JANIS: Under the proposed lines, the total African American population would be 31.60%.

DELEGATE SPRUILL: Thirty one point?

DELEGATE JANIS: 31.6. So it's just about, it's 2.06% change.

DELEGATE SPRUILL: Can you give me the Third now please?

DELEGATE JANIS: The Third District goes from 55.33% under the current lines to 58.50% under the proposed line. That's 3.17%.

DELEGATE SPRUILL: The next question then, why would you increase, why would you increase the number of the Third Congressional District to more approximately 55 to 58, when already [unintelligible] tradition it will be hard for a black not to win it unless there's a lot of candidates [unintelligible] couldn't win it. Why would you increase it from 55 to 58 and drop to 30 and drop the Fourth down?

DELEGATE JANIS: If you take the numbers I just told you, those are the total African American population.

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Attachment 17

IN THE MATTER OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS

Notice of Public Meeting for Discussion of Senate Bill 5004, Congressional Redistricting Plan

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BEFORE: JANET D. HOWELL, CHAIRPERSON
COMMONWEALTH OF VIRGINIA
GENERAL ASSEMBLY BUILDING
SENATE MEETING ROOM
910 CAPITOL STREET
RICHMOND, VIRGINIA 23218

DATE: JUNE 9, 2011 – 10:00 A.M.

PANEL: JANET D. HOWELL, 32nd Senate District
STEPHEN MARTIN, 11th Senate District
MARK D. OBENSHAIN, 26th Senate District
HARRY B. BLEVINS, 14th Senate District
RALPH K. SMITH, 22nd Senate District
JILL HOLTZMAN VOGEL, 27th Senate

District

* * *

[Page 5]

DELEGATE JANIS: Thank you, Madam Chairman and members of the Committee. I won't tread on your time any more; we had such a debate on the legislation during the session before this was moved back to Committee

I will just tell the Committee that House Bill 5004, the criteria we tried to apply in drawing the district boundaries for the 11 Congressional districts in House Bill 5004 were several. One, it actually had to comply with all the requirements of the United States Constitution and the Constitution of Virginia. We believe House Bill 5004 does that.

Two, it had to comply with the Voting Rights Act and all applicable federal law; it does that. The two criteria in particular that were relevant in drawing up the lines, under federal law and the Voting Rights Act are the following: One, it has to have a zero variance under federal law. Zero variance means in this case, based on the 2010 census data, each of the 11 Congressional districts must comprise a territory where, based on the 2010 census, there are no fewer than 727,355 residents but no more than 727,356 residents, a one-person variance. You can split precincts, you can split census blocks, but you can't cut the baby in half. You have to have no more than a one-person variance between each district.

The second requirement of the zero variance under the Voting Rights Act we think is relevant, is we attempted to draw the lines in such a way that there was no "retrogression" of a minority voter influence

as required under the Voting Rights Act. Now, it's important to know that the Voting Rights Act doesn't use the word retrogression; it comes from subsequent case law. The term retrogression, generally speaking, means any act or policy or change in voting law that would reduce the voting influence of minority populations within a jurisdiction. We believe that House Bill 5004 complies with those requirements, most specifically vis-à-vis the lines for the 3rd Congressional District, which is the point of contention between House Bill 5004 as introduced in the past by the House and proposed amendments by Senator Locke.

* * *

[Page 8]

SENATOR MCEACHIN: Madam Chair, do we, I know we have Senator Locke's compacted scores. Do we have compacted scores from Delegate Janis' plan? Do we have enough numbers?

SENATOR HOWELL : Staff, do we have it?

DELEGATE JANIS: I would say, Madam Chair, precisely because we didn't examine compactness scores, I can't speak to the relevance. I don't know the compaction scores of Senator Locke's plan or any of the compacted scores in the House bill. I'm not competent to offer an opinion about the relative compactness.

SENATOR MCEACHIN: Can I have a final question?

SENATOR HOWELL: Senator McEachin.

SENATOR MCEACHIN: Delegate Janis, can you explain why you or the House staff or whoever didn't do it, didn't look at compacted scores? Do you not consider compacted scores to be important?

DELEGATE JANIS: What I would say is that the criteria that we applied were we wanted to follow the United States Constitution and the Virginia Constitution, which includes compactness, but it's not the only criteria that we applied. We also wanted to ensure that we had complied with zero variance, which we did. We wanted to make sure there was no retrogression, as best as we could determine, of minority voter influence, because we felt that these criteria were the ones that were the most important criteria and were the ones that were the most likely to get us into trouble if we didn't apply them. And then what we also took into account was recommendations that we received from the members of the congressional delegation themselves and tried to reconcile sometimes competing recommendations about where the lines ought to be drawn in a way that would be in its totality each member of the delegation could look at it and say, without speaking to the overall plan, that they could support the lines for their congressional district as were drawn vis-à-vis their congressional districts. Once again, there are different ways that the lines could have been drawn, but candidly those were the criteria that we thought were most important in putting together a plan that not only would garner political support, bipartisan support both in the House and Senate, but also would pass constitutional and legal challenge.

HB 251 Introduced – Delegate Bell
Population Totals

DISTRICT	Total Pop.	Target	Difference	Deviation
1	727,366	727,366	0	0.0%
2	727,366	727,366	0	0.0%
3	727,366	727,366	0	0.0%
4	727,366	727,366	0	0.0%
5	727,365	727,366	-1	0.0%
6	727,366	727,366	0	0.0%
7	727,366	727,366	0	0.0%
8	727,366	727,366	0	0.0%
9	727,366	727,366	0	0.0%
10	727,365	727,366	-1	0.0%
11	727,366	727,366	0	0.0%

HB 251 Introduced – Delegate Bell
Racial Demographics

DISTRICT	Total Population	White	% White	Black	% Black	AIAN	% AIAN
1	727,366	527,650	72.5%	130,061	17.9%	6,435	0.9%
2	727,366	483,615	66.5%	167,162	23.0%	5,983	0.8%
3	727,366	246,712	33.9%	432,581	59.5%	5,554	0.8%
4	727,366	447,441	61.5%	235,678	32.4%	5,098	0.7%
5	727,365	542,589	74.6%	154,368	21.2%	4,149	0.6%
6	727,366	607,889	83.6%	84,851	11.7%	4,609	0.6%
7	727,366	556,598	76.5%	111,369	15.3%	4,698	0.6%
8	727,366	454,669	62.5%	105,900	14.6%	5,554	0.8%
9	727,366	666,198	91.6%	40,053	5.5%	3,526	0.5%
10	727,365	527,743	72.6%	54,611	7.5%	4,011	0.6%
11	727,366	425,748	58.5%	96,820	13.3%	5,246	0.7%

HB 251 Introduced – Delegate Bell
Racial Demographics

DISTRICT	Total Population	Asian	% Asian	HawPI	% HawPI	Other	% Other
1	727,366	29,672	4.1%	1,035	0.1%	26,577	3.7%
2	727,366	42,530	5.8%	1,489	0.2%	18,340	2.5%
3	727,366	16,134	2.2%	967	0.1%	16,781	2.3%
4	727,366	18,153	2.5%	782	0.1%	15,248	2.1%
5	727,365	13,088	1.8%	371	0.1%	10,554	1.5%
6	727,366	12,343	1.7%	407	0.1%	14,868	2.0%
7	727,366	33,412	4.6%	559	0.1%	16,836	2.3%
8	727,366	89,760	12.3%	962	0.1%	63,612	8.7%
9	727,366	9,626	1.3%	272	0.0%	6,506	0.9%
10	727,365	96,867	13.3%	778	0.1%	38,400	5.3%
11	727,366	137,228	18.9%	957	0.1%	54,161	7.4%

HB 251 Introduced – Delegate Bell
Racial Demographics

DISTRICT	Total Population	Multi	% Multi	Total Hispanic	% Hispanic
1	727,366	5,936	0.8%	61,279	8.4%
2	727,366	8,247	1.1%	50,019	6.9%
3	727,366	8,637	1.2%	37,044	5.1%
4	727,366	4,966	0.7%	34,360	4.7%
5	727,365	2,246	0.3%	22,973	3.2%
6	727,366	2,399	0.3%	31,018	4.3%
7	727,366	3,894	0.5%	36,815	5.1%
8	727,366	6,909	0.9%	135,594	18.6%
9	727,366	1,185	0.2%	13,904	1.9%
10	727,365	4,955	0.7%	85,367	11.7%
11	727,366	7,206	1.0%	123,452	17.0%

HB 251 Introduced – Delegate Bell
Voting Age Population

DISTRICT	Voting Age Persons	VAP White	% VAP White	VAP Black	% VAP Black	VAP AIAN	% VAP AIAN
1	543,139	405,154	74.6%	91,813	16.9%	4,600	0.8%
2	565,464	389,929	69.0%	120,213	21.3%	4,640	0.8%
3	560,158	208,802	37.3%	315,603	56.3%	4,358	0.8%
4	547,486	346,507	63.3%	171,434	31.3%	3,750	0.7%
5	574,341	436,040	75.9%	116,491	20.3%	3,156	0.5%
6	572,702	488,611	85.3%	60,264	10.5%	3,520	0.6%
7	549,562	428,788	78.0%	80,425	14.6%	3,398	0.6%
8	580,212	375,269	64.7%	79,591	13.7%	4,213	0.7%
9	584,877	538,799	92.1%	30,113	5.1%	2,853	0.5%
10	520,811	387,308	74.4%	36,962	7.1%	2,706	0.5%
11	548,595	334,137	60.9%	67,339	12.3%	3,592	0.7%

HB 251 Introduced – Delegate Bell
Voting Age Population

DISTRICT	Voting Age Persons	VAP Asian	% VAP Asian	VAP HawPI	% VAP HawPI	VAP Other	% VAP Other
1	543,139	20,586	3.8%	681	0.1%	17,157	3.2%
2	565,464	32,067	5.7%	1,102	0.2%	12,768	2.3%
3	560,158	13,297	2.4%	687	0.1%	12,123	2.2%
4	547,486	12,721	2.3%	493	0.1%	9,926	1.8%
5	574,341	10,186	1.8%	283	0.0%	6,784	1.2%
6	572,702	9,010	1.6%	305	0.1%	9,534	1.7%
7	549,562	23,375	4.3%	373	0.1%	10,975	2.0%
8	580,212	69,715	12.0%	738	0.1%	46,039	7.9%
9	584,877	7,897	1.4%	219	0.0%	4,201	0.7%
10	520,811	65,528	12.6%	541	0.1%	25,026	4.8%
11	548,595	101,292	18.5%	710	0.1%	37,301	6.8%

HB 251 Introduced – Delegate Bell
Voting Age Population

DISTRICT	Voting Age Persons	VAP Multi	% VAP Multi	Voting Age Hispanic	% VAP Hispanic
1	543,139	3,148	0.6%	38,845	7.2%
2	565,464	4,745	0.8%	33,688	6.0%
3	560,158	5,288	0.9%	25,479	4.5%
4	547,486	2,655	0.5%	21,796	4.0%
5	574,341	1,401	0.2%	15,077	2.6%
6	572,702	1,458	0.3%	19,899	3.5%
7	549,562	2,228	0.4%	23,883	4.3%
8	580,212	4,647	0.8%	98,819	17.0%
9	584,877	795	0.1%	9,226	1.6%
10	520,811	2,740	0.5%	55,325	10.6%
11	548,595	4,224	0.8%	84,820	15.5%

HB 251 Introduced – Delegate Bell
Election Data

DISTRICT	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09
1	66%	34%	63%	37%	64%	36%
2	62%	38%	57%	43%	60%	40%
3	31%	69%	29%	71%	31%	69%
4	63%	37%	60%	40%	62%	38%
5	62%	38%	61%	39%	62%	38%
6	67%	33%	67%	33%	68%	32%
7	68%	32%	65%	35%	67%	33%
8	40%	60%	38%	62%	38%	62%
9	66%	34%	66%	34%	66%	34%
10	63%	37%	60%	40%	60%	40%
11	50%	50%	47%	53%	47%	53%

HB 251 Introduced – Delegate Bell
Election Data

DISTRICT	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08
1	53%	46%	1%	39%	60%	1%
2	50%	49%	1%	35%	64%	1%
3	22%	78%	1%	16%	83%	1%
4	51%	48%	1%	39%	60%	1%
5	52%	47%	1%	36%	63%	1%
6	58%	41%	1%	42%	57%	1%
7	56%	43%	1%	41%	58%	1%
8	33%	66%	1%	26%	73%	1%
9	59%	40%	1%	36%	63%	1%
10	50%	50%	1%	39%	60%	1%
11	38%	61%	1%	30%	68%	1%

Current Congressional Districts
District Population Summary

DISTRICT	Total Population	Target	Difference	Deviation from Ideal
1	786,237	727,366	58,871	8.1%
2	646,184	727,366	-81,182	-11.2%
3	663,390	727,366	-63,976	-8.8%
4	738,639	727,366	11,273	1.5%
5	685,859	727,366	-41,507	-5.7%
6	704,056	727,366	-23,310	-3.2%
7	757,917	727,366	30,551	4.2%
8	701,010	727,366	-26,356	-3.6%
9	656,200	727,366	-71,166	-9.8%
10	869,437	727,366	142,071	19.5%
11	792,095	727,366	64,729	8.9%

Current Congressional Districts
Demographic Population Totals

DISTRICT	Total Population	White	% White	Black	% Black	AIAN	% AIAN
1	786,237	558,404	71.0%	164,455	20.9%	6,612	0.8%
2	646,184	427,383	66.1%	149,285	23.1%	5,459	0.8%
3	663,390	246,414	37.1%	373,134	56.2%	5,407	0.8%
4	738,639	441,259	59.7%	254,180	34.4%	5,074	0.7%
5	685,859	501,303	73.1%	155,886	22.7%	3,753	0.5%
6	704,056	585,107	83.1%	84,891	12.1%	4,348	0.6%
7	757,917	563,423	74.3%	135,386	17.9%	4,604	0.6%
8	701,010	444,616	63.4%	99,886	14.2%	5,182	0.7%
9	656,200	609,813	92.9%	28,039	4.3%	3,185	0.5%
10	869,437	611,159	70.3%	71,471	8.2%	5,327	0.6%
11	792,095	497,971	62.9%	96,841	12.2%	5,912	0.7%

Current Congressional Districts
Demographic Population Totals

DISTRICT	Total Population	Asian	% Asian	HawPI	% HawPI	Other	% Other
1	786,237	26,452	3.4%	1,105	0.1%	22,428	2.9%
2	646,184	39,012	6.0%	1,357	0.2%	16,213	2.5%
3	663,390	15,449	2.3%	901	0.1%	14,355	2.2%
4	738,639	17,637	2.4%	787	0.1%	14,724	2.0%
5	685,859	12,312	1.8%	311	0.0%	10,204	1.5%
6	704,056	12,311	1.7%	390	0.1%	14,700	2.1%
7	757,917	32,784	4.3%	523	0.1%	17,198	2.3%
8	701,010	84,581	12.1%	844	0.1%	59,460	8.5%
9	656,200	8,764	1.3%	254	0.0%	5,114	0.8%
10	869,437	119,178	13.7%	907	0.1%	55,074	6.3%
11	792,095	130,333	16.5%	1,200	0.2%	52,413	6.6%

Current Congressional Districts
Demographic Population Totals

DISTRICT	Total Population	Multi	% Multi	Hispanic	% Hispanic
1	786,237	6,781	0.9%	53,012	6.7%
2	646,184	7,475	1.2%	45,210	7.0%
3	663,390	7,730	1.2%	32,713	4.9%
4	738,639	4,978	0.7%	33,353	4.5%
5	685,859	2,090	0.3%	20,935	3.1%
6	704,056	2,309	0.3%	30,117	4.3%
7	757,917	3,999	0.5%	36,794	4.9%
8	701,010	6,441	0.9%	127,533	18.2%
9	656,200	1,031	0.2%	11,632	1.8%
10	869,437	6,321	0.7%	117,278	13.5%
11	792,095	7,425	0.9%	123,248	15.6%

Current Congressional Districts
Voting Age Population Totals

DISTRICT	Voting Age Pop.	VAP White	% VAP White	VAP Black	% VAP Black	VAP AIAN	% VAP AIAN
1	592,940	434,385	73.3%	116,161	19.6%	4,797	0.8%
2	500,240	343,037	68.6%	107,121	21.4%	4,217	0.8%
3	511,559	207,441	40.6%	271,419	53.1%	4,200	0.8%
4	557,742	342,184	61.4%	186,644	33.5%	3,746	0.7%
5	543,596	405,436	74.6%	117,536	21.6%	2,866	0.5%
6	556,067	472,240	84.9%	60,303	10.8%	3,346	0.6%
7	576,326	437,613	75.9%	98,210	17.0%	3,360	0.6%
8	565,094	370,959	65.6%	75,734	13.4%	3,960	0.7%
9	528,131	492,562	93.3%	21,444	4.1%	2,579	0.5%
10	629,287	453,796	72.1%	49,016	7.8%	3,641	0.6%
11	586,365	379,691	64.8%	66,660	11.4%	4,074	0.7%

Current Congressional Districts
Voting Age Population

DISTRICT	Voting Age Pop.	VAP Asian	% VAP Asian	VAP HawPI	% VAP HawPI	VAP Other	% VAP Other
1	592,940	18,735	3.2%	756	0.1%	14,488	2.4%
2	500,240	29,285	5.9%	998	0.2%	11,259	2.3%
3	511,559	12,758	2.5%	652	0.1%	10,357	2.0%
4	557,742	12,349	2.2%	492	0.1%	9,614	1.7%
5	543,596	9,685	1.8%	238	0.0%	6,529	1.2%
6	556,067	9,008	1.6%	295	0.1%	9,455	1.7%
7	576,326	23,110	4.0%	356	0.1%	11,362	2.0%
8	565,094	66,225	11.7%	675	0.1%	43,128	7.6%
9	528,131	7,287	1.4%	204	0.0%	3,343	0.6%
10	629,287	82,026	13.0%	644	0.1%	36,543	5.8%
11	586,365	95,206	16.2%	822	0.1%	35,756	6.1%

Current Congressional Districts
Voting Age Population

DISTRICT	Voting Age Pop.	VAP Multi	% VAP Multi	VAP Hispanic	% VAP Hispanic
1	592,940	3,618	0.6%	33,602	5.7%
2	500,240	4,323	0.9%	30,312	6.1%
3	511,559	4,732	0.9%	22,506	4.4%
4	557,742	2,713	0.5%	21,184	3.8%
5	543,596	1,306	0.2%	13,800	2.5%
6	556,067	1,420	0.3%	19,404	3.5%
7	576,326	2,315	0.4%	24,120	4.2%
8	565,094	4,413	0.8%	93,296	16.5%
9	528,131	712	0.1%	7,810	1.5%
10	629,287	3,621	0.6%	77,158	12.3%
11	586,365	4,156	0.7%	83,665	14.3%

Current Congressional Districts
Election Data

DISTRICT	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09
1	65%	35%	62%	38%	63%	37%
2	62%	38%	56%	44%	60%	40%
3	34%	66%	33%	67%	35%	65%
4	61%	39%	59%	41%	61%	39%
5	61%	39%	60%	40%	62%	38%
6	67%	33%	66%	34%	67%	33%
7	66%	34%	63%	37%	65%	35%
8	39%	61%	37%	63%	36%	64%
9	67%	33%	66%	34%	66%	34%
10	61%	39%	58%	42%	58%	42%
11	55%	45%	52%	48%	52%	48%

HB 251 Introduced – Delegate Bell
Election Data

DISTRICT	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08
1	53%	47%	1%	38%	61%	1%
2	50%	50%	1%	34%	64%	1%
3	25%	75%	1%	18%	81%	1%
4	50%	49%	1%	37%	61%	1%
5	52%	47%	1%	35%	64%	1%
6	58%	41%	1%	41%	58%	1%
7	54%	45%	1%	39%	59%	1%
8	32%	67%	1%	25%	73%	1%
9	59%	39%	1%	36%	63%	1%
10	48%	51%	1%	38%	61%	1%
11	44%	56%	1%	35%	64%	1%

SB 5004 – M. Locke
Population Totals

DISTRICT	Total Population	Target	Differ-ence	Deviation
1	727,367	727,366	1	0.0%
2	727,362	727,366	-4	0.0%
3	727,367	727,366	1	0.0%
4	727,367	727,366	1	0.0%
5	727,366	727,366	0	0.0%
6	727,366	727,366	0	0.0%
7	727,366	727,366	0	0.0%
8	727,366	727,366	0	0.0%
9	727,366	727,366	0	0.0%
10	727,365	727,366	-1	0.0%
11	727,366	727,366	0	0.0%

SB 5004 - M. Locke
Racial Demographics

DISTRICT	Total Population	White	% White	Black	% Black	AIAN	% AIAN	Asian
1	727,367	543,967	74.8%	139,147	19.1%	6,325	0.9%	16,993
2	727,362	518,695	71.3%	138,310	19.0%	5,776	0.8%	42,153
3	727,367	346,939	47.7%	324,133	44.6%	5,760	0.8%	23,671
4	727,367	290,090	39.9%	389,360	53.5%	4,973	0.7%	14,227
5	727,366	521,885	71.7%	170,723	23.5%	4,277	0.6%	15,480
6	727,366	654,758	90.0%	43,343	6.0%	4,482	0.6%	9,662
7	727,366	551,123	75.8%	98,626	13.6%	4,790	0.7%	41,863
8	727,366	454,669	62.5%	105,900	14.6%	5,554	0.8%	89,760
9	727,366	651,235	89.5%	52,481	7.2%	3,669	0.5%	10,909
10	727,365	527,743	72.6%	54,611	7.5%	4,011	0.6%	96,867
11	727,366	425,748	58.5%	96,820	13.3%	5,246	0.7%	137,228

SB 5004 - M. Locke
Racial Demographics (cont'd)

% Asian	HawPI	% HawPI	Other	% Other	Multi	% Multi	Total Hispanic	% Hispanic
2.3%	790	0.1%	15,480	2.1%	4,665	0.6%	37,841	5.2%
5.8%	1,317	0.2%	14,619	2.0%	6,492	0.9%	42,063	5.8%
3.3%	1,362	0.2%	15,620	2.1%	9,882	1.4%	42,499	5.8%
2.0%	679	0.1%	22,066	3.0%	5,972	0.8%	40,841	5.6%
2.1%	387	0.1%	11,775	1.6%	2,839	0.4%	24,365	3.3%
1.3%	377	0.1%	13,119	1.8%	1,625	0.2%	27,378	3.8%
5.8%	667	0.1%	25,793	3.5%	4,504	0.6%	56,069	7.7%
12.3%	962	0.1%	63,612	8.7%	6,909	0.9%	135,594	18.6%
1.5%	303	0.0%	7,238	1.0%	1,531	0.2%	16,356	2.2%
13.3%	778	0.1%	38,400	5.3%	4,955	0.7%	85,367	11.7%
18.9%	957	0.1%	54,161	7.4%	7,206	1.0%	123,452	17.0%

SB 5004 - M. Locke
Voting Age Population

DISTRICT	Voting Age Population	VAP White	% VAP White	VAP Black	% VAP Black	VAP AIAN	% VAP AIAN	VAP Asian
1	546,844	418,340	76.5%	99,668	18.2%	4,567	0.8%	11,558
2	552,119	404,939	73.3%	98,363	17.8%	4,330	0.8%	30,538
3	563,795	287,650	51.0%	234,693	41.6%	4,491	0.8%	18,600
4	562,948	240,551	42.7%	287,625	51.1%	3,862	0.7%	11,454
5	573,420	421,926	73.6%	126,588	22.1%	3,260	0.6%	12,085
6	572,210	520,978	91.0%	31,425	5.5%	3,393	0.6%	6,942
7	542,620	420,286	77.5%	70,057	12.9%	3,405	0.6%	29,110
8	580,212	375,269	64.7%	79,591	13.7%	4,213	0.7%	69,715
9	583,773	527,960	90.4%	37,937	6.5%	2,967	0.5%	8,852
10	520,811	387,308	74.4%	36,962	7.1%	2,706	0.5%	65,528
11	548,595	334,137	60.9%	67,339	12.3%	3,592	0.7%	101,292

SB 5004 - M. Locke
Voting Age Population (cont'd)

% VAP Asian	VAP HawPI	% VAP HawPI	VAP Other	% VAP Other	VAP Multi	% VAP Multi	Voting Age Hispanic	% VAP Hispanic
2.1%	526	0.1%	9,717	1.8%	2,468	0.5%	23,596	4.3%
5.5%	917	0.2%	9,652	1.7%	3,380	0.6%	26,708	4.8%
3.3%	986	0.2%	11,439	2.0%	5,936	1.1%	29,517	5.2%
2.0%	448	0.1%	15,279	2.7%	3,729	0.7%	27,839	4.9%
2.1%	295	0.1%	7,548	1.3%	1,718	0.3%	16,085	2.8%
1.2%	295	0.1%	8,202	1.4%	975	0.2%	17,083	3.0%
5.4%	445	0.1%	16,805	3.1%	2,512	0.5%	35,996	6.6%
12.0%	738	0.1%	46,039	7.9%	4,647	0.8%	98,819	17.0%
1.5%	231	0.0%	4,826	0.8%	1,000	0.2%	11,069	1.9%
12.6%	541	0.1%	25,026	4.8%	2,740	0.5%	55,325	10.6%
18.5%	710	0.1%	37,301	6.8%	4,224	0.8%	84,820	15.5%

SB 5004 - M. Locke
Election Data

DISTRICT	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09
1	68%	32%	66%	34%	66%	34%
2	66%	34%	61%	39%	64%	36%
3	45%	55%	42%	58%	44%	56%
4	40%	60%	39%	61%	41%	59%
5	62%	38%	61%	39%	62%	38%
6	69%	31%	69%	31%	70%	30%
7	68%	32%	65%	35%	67%	33%
8	40%	60%	38%	62%	38%	62%
9	65%	35%	65%	35%	65%	35%
10	63%	37%	60%	40%	60%	40%
11	50%	50%	47%	53%	47%	53%

COMMONWEALTH of VIRGINIA
Office of the Attorney General
Richmond 23219

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February 13, 1998

BY HAND

The Honorable Elizabeth Johnson
Chief, Voting Section, Civil Rights Division
U.S. Department of Justice
320 First Street, N.W., Room 818A
Washington, D.C. 20001

Re: Submission under Section 5 of the Voting Rights Act:
Ch. 1,1998 Va. Acts
Redistricting U.S. Congressional Seats

Dear Voting Section Chief Johnson:

Pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the Office of the Attorney General of Virginia hereby submits Ch. 1, 1998 Va. Acts, redistricting the U.S. Congressional Seats allocated to Virginia. This submission includes the information required under 28 C.F.R §§ 51.26 and 51.27, as well as supplemental information permitted under § 51.28.

As is detailed in the accompanying submission, Virginia was required to draw new Congressional district lines by mandate of the three judge panel in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va.), *affd*, 117 S.Ct. 2501 (1997). The Court determined that

Virginia's Third Congressional District was an unconstitutional racial gerrymander. The Court has enjoined any elections in the Third District until a new District conforming to constitutional requirements has been [illegible]. The Court has ordered Virginia to draw a new District conforming to all requirements of law.

Virginia has addressed the concerns of the Court by revising the boundaries of the Third District, and the adjoining First, Second, Fourth, and Seventh Districts. The boundaries of the Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Districts remain unchanged. Chapter 11 of 1998 Acts of Assembly, [illegible] eliminates splits in the jurisdiction of Hanover County, the City of Petersburg, the City of Portsmouth, Prince George County Pennsylvania County, and the Cities of Suffolk and Virginia Beach. The new district lines result in significantly more compact and contiguous districts. No existing precinct lines have been divided by the new district lines. The new district lines respect communities of interest, and they minimize disruption and voter confusion to the greatest extent practicable. The new district lines maintain equal population, with extremely low deviations. All eleven members of Virginia's Congressional delegation approve of these new district lines, including the Third District incumbent, Representative Robert C. Scott. The Plan has this bi-partisan support because it advances Virginia's important economic interests, by maintaining Virginia's representation on strategic Congressional military subcommittees.

The 1991 Congressional redistricting plan created Virginia's first Congressional District with a majority

black total and voting age population. After amendments by the 1992 and 1993 sessions of the General Assembly, the Third District contained a total black population of 64.37 percent, and a black voting age population of 61.60 percent. The 1998 adjustments modify the Third District, which now contains a 53.59 percent black total population, and a 50.47 percent black voting age population. The 1998 plan slightly increases the black total and voting age populations in the adjoining First, Second, and Seventh Districts. The 1998 plan increases the black total and voting age populations in the Fourth District to percentages which are almost identical to those of the 1982 district under the 1990 census, with a 38.59 percent black total population, and a 36.75 percent black voting age population. The result of the adjustments in the 1998 plan to address the concerns of the *Moon v. Meadows* Court is that it reestablishes the Fourth District as a strong minority influence district.

We are hopeful that the Department of Justice can review and approve this submission as quickly as possible, so as to minimize any disruption in the conduct of the 1998 Congressional elections. We look forward to working with you on this matter and are prepared to provide you promptly with any further information the Department may require to complete its review of this submission. Please do not hesitate to call Assistant Attorney General Mary E. Shea at (804) 786-8198 if you have any questions or if we may be of further assistance.

Sincerely,

Francis S. Ferguson
Deputy Attorney
General

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Education

Post-Doctoral Fellow. Harvard University. August 1998 – August 1999.
Ph.D. Political Science. University of California, San Diego. February, 1999.
BS Economics. California Institute of Technology. June, 1989.

Awards

Tides Pizzigati Prize. 2013. Public interest software for DistrictBuilder.

Strata Innovation Award. 2012. Data Used for Social Impact for DistrictBuilder.

American Political Science Association, Information and Technology Politics Section. 2012. Software of the Year for DistrictBuilder.

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Grants

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Citizen Redistricting Education, Software Supplemental. 2011. ($50,000). Project funded by Joyce Foundation to provide continued redistricting software development for use by advocacy groups in six Midwestern states.

National Redistricting Reform Coordination. 2009-10. ($100,000). With Thomas Mann and Norman Ornstein. Project funded by Joyce Foundation to support coordination of national redistricting reform efforts by the Brookings Institution and the American Enterprise Institute.

Citizen Mapping Project. 2009-10. ($124,000 & $98,000). With Micah Altman, Thomas Mann, and Norman Ornstein. Project funded by the Sloan Foundation. An award to George Mason University enables development of software that, essentially, permits on-line redistricting through commonly

used internet mapping programs. A second award to the Brookings Institution and American Enterprise Institute provides organizational support, including the convening of an advisory board.

Citizen Redistricting Education. 2010. ($104,000). Project funded by the Joyce Foundation. Provides for redistricting education forums in five Midwestern state capitals in 2010 and other continuing education efforts.

Pre-Registration Programs. 2008-9. ($86,000). Project funded by the Pew Charitable Trusts' Make Voting Work Initiative to examine pre-registration programs (voter registration for persons under age 18) in Florida and Hawaii.

Sound Redistricting Reform. 2006-9. ($405,000). Project funded by the Joyce Foundation, conducted jointly with the Brennan Center for Justice at NYU to investigate impacts of redistricting reform in Midwestern states.

Electoral Competition Project. 2005-6. ($200,000) Project funded by The Armstrong Foundation, the Carnegie Corporation of New York, the JEHT Foundation, The Joyce Foundation, The Kerr Foundation, Inc., and anonymous donors. Jointly conducted by the Brookings Institution and Cato Institute to investigate the state of electoral competition in the United States.

George Mason University Provost Summer Research Grant. 2004. ($5,000).

ICPSR Data Document Initiative. 1999. Awarded beta test grant. Member, advisory committee on creation of electronic codebook standards.

Academic Experience

Courses Taught: Public Opinion and Voting Behavior, Parties and Campaigns, Comparative Electoral Institutions, Intro to American-Politics, American Politics Graduate Field Seminar, Congress, Legislative Politics, Research Methods (undergraduate), Advanced Research Methods (graduate), Freshman Seminar: Topics in Race and Gender Policies, and Legislative Staff Internship Program.

George Mason University

- Associate Professor. May 2007 – Present.
- Assistant Professor. Aug 2002 – May, 2007.

The Brookings Institution

- Non-Resident Senior Fellow. January 2006 – Present.
- Visiting Fellow. June 2004 – December 2006.

University of Illinois. Springfield. Assistant Professor. Aug 2000 – June 2002. Joint appointment in Political Studies Department and Legislative Studies Center.

Vanderbilt University. Assistant Professor. Aug 1999 – Aug 2000.

Harvard-MIT Data Center. Post-Doctoral Research Fellow. Sept. 1998 – Aug 1999. Developed Virtual Data Center, a web-based data sharing system for academics. Maintained Record of American Democracy (U.S. precinct-level election data).

University of California-San Diego

- Assistant to the Director for University of California, Washington DC program. Sept 1997-June 1998.

- Instructor for research methods seminar for UCSD Washington interns.
- Visiting Assistant Professor. Spring Quarter 1997.
- Visiting Assistant Professor. Summer Session, Aug 1996 and Aug 1997.
- Teaching Assistant/Grader. Aug 1991 – March 1997.

Professional Service

State Politics and Policy Quarterly, Editorial Board Member 2004-2011

State Politics and Policy Quarterly, Guest Editor. Dec 2004 issue.

Non-Projit Voter Engagement Network, Member, Advisory Board. 2007 – present.

Overseas Vote Foundation, Member, Advisory Board. 2005 – 2013.

National Capital Area Political Science Association, Member, Council, 2010-2012.

Virginia Public Access Project, Member, Board of Directors. 2004 – 2006.

Fairfax County School Board Adult and Community Education Advisory Committee, Member. 2004-2005.

Related Professional Experience

Media Consultant

- Associated Press. Nov. 2010. Worked "Decision Desk."
- Edison Media Research/Mitofsky International. Nov. 2004; Nov. 2006; Feb. 2008; Nov. 2008. Worked national exit polling organization's "Decision Desk."

- ABC News. Nov. 2002. Worked "Decision Desk."
- NBC News. Aug 1996. Analyzed polls during the Republican National Convention.

Redistricting/Elections Consultant.

- Expert Witness. 2013. *Delgado v. Galvin.* No. 1:12-cv-10872-DJC (D. Massachusetts).
- Beaumont Independent School District. 2013. Prepared response to DOJ data request.
- Federal Voting Assistance Program. 2012-13. Analyzed voting experience of military and overseas voters.
- Gerson Lehrman Group. 2012. Analyzed election for corporate clients.
- Expert Witness. 2011-2012. *Backus* v. *South Carolina.* No. 3:1 l-cv-03120 (D.S.C.).
- Expert Witness. 2012. *Wilson* v. *Kasich.* No. 2012-0019 (Ohio Sup. Ct.).
- Consulting Expert. 2011-2012. Bondurant, Mixson, and Elmore, LLP. Reviewed Georgia's state legislative and congressional redistricting Section 5 submission.
- Consultant. 2012. New Jersey Congressional Redistricting Commission.
- Expert Witness. 2011. *Perez v. Texas.* No. 5:11-cv-00360 (W.D. Tex.).
- Expert Witness. 2011. *Wilson v. Fallin.* No. O-109652 (Okla. Sup. Ct.).
- Consultant. 2011. United States Federal Voting Assistance Program.
- Consultant. 2011. Virginia Governor's Independent Bipartisan Advisory Redistricting Commission.
- Consultant. 2011. New Jersey State Legislative Redistricting Commission.

- Expert Witness. 2010. *Healey* v. *State, et al.* USDC-RI C.A. No. 10-316—S.
- Research Triangle Institute. 2008-2009. Consultant for Election Assistance Commission, 2008 Election Day Survey.
- U.S. State Department. 2008. Briefed visiting foreign nationals on U.S. elections.
- Expert Witness. 2008. *League of Women Voters of Florida v. Browning.* 08-21243-CV-ALTONAGA/BROWN.
- Pew Center for the States. 2007. Consultant for Trends to Watch project.
- Expert Witness. 2007. *Washington Association of Churches v. Reed.* CV06-0726.
- Electoral Assistance Commission. 2005. Analyzed election administration surveys.
- Arizona Independent Redistricting Commission. 2001-2003. Consultant.
- Expert Witness. 2003. *Minority Coalition for Fair Redistricting, et al. v. Arizona Independent Redistricting Commission* CV2002-004380 (2003).
- Expert Witness. 2003. *Rodriguez* v. *Pataki* 308 F. Supp. 2d 346 (S.D.N.Y 2004).
- Consulting Expert. 2002. *O'Lear v. Miller* No. 222 F. Supp. 2d 850 (E.D. Mich.).
- Expert Witness. 2001-2002. *In Re 2001 Redistricting Cases.* Case No. S-10504.
- Consulting Expert. 2001. *United States v. Upper San Gabriel Valley Municipal Water District.* CD. Cal. 2000)
- California State Assembly. 1991. Consultant.
- Pactech Data and Research. Research Associate. Aug 1989 – June 1991.

Campaign/Political Consultant.

- Ron Christian for Virginia State Senate. June – November, 2003.
- Theresa Martinez for Virginia House of Delegates. May, 2003.
- Senior Consultant. California State Assembly. Nov. – Dec 1998.
- California Assembly Democrats. June – November 1998.
- Susan Davis & Howard Wayne for CA State Assembly '96. 1996.
- Intern. June – Sept 1995. UC-San Diego, Science and Technology Policy and Projects.

Polling Consultant.

- Hickman-Brown. July, 2000. Analyzed national and state level exit and CPS polls for use in various campaigns. Analyzed surveys for congressional, state, and local political campaigns.
- Decision Research. Aug 1994 – Dec 1994. Conducted and analyzes surveys for congressional and statewide campaigns.
- Speaker Jose de Venecia of the Philippines. Feb, 1997.
- Joong-Ang Ilbo/RAND. Oct, 1996. Analyzed survey of Korean attitudes on national security issues.
- UCSD. Nov. 1991. Conducted and analyzed survey of student attitudes.

Summary of Expert Report of Dr. Michael P. McDonald

Page v. State Board of Elections

Biographical Information

I am Associate Professor of Government at Politics at George Mason University and a non-resident Senior Fellow at the Brookings Institution.

I have been involved in redistricting since the late 1980s when I prepared racial bloc voting analyses for the Department of Justice in *Garza* v *Los Angeles Board of Supervisors.* Since then I have been involved as a consultant to redistricting authorities or parties in litigation in fourteen states. I have also provided court testimony at trial or by deposition in a number of redistricting cases. Finally, I have produced numerous scholarly writings on the American electoral system. Please see my attached vita for more information regarding my academic publications and professional experience.

I have a specific interest in Geographic Information System applications to enable greater public participation in redistricting. I co-led a team with Dr. Micah Altman that developed award-winning open-source redistricting software called DistrictBuilder that allows users to draw districts through web-browsers. We deployed this software to support advocacy efforts and actual redistricting efforts by government officials in several jurisdictions within the United States and Mexico.

Among the government bodies that used our software was Virginia Governor Bob McDonnell's Independent Bipartisan Advisory Redistricting Commission, to which I also served as a mapping consultant. The

software was also deployed to support a Virginia college student redistricting competition that occurred concurrently with the Commission's and the General Assembly's redistricting deliberations.

Background and Data Sources

I have been retained by Perkins Coie LLP on behalf of Plaintiffs in *Page* v. *Virginia State Board of Elections* to provide expert witness testimony regarding voting rights claims challenging Virginia's Third Congressional District as being the product of an unlawful racial gerrymander. I am being compensated at a rate of $300/hr.

I obtained from the Census Bureau Virginia's 2010 census population and geographic data produced in support of redistricting.[2] Because my work in this matter will relay on these data, an overview of certain aspects of these data is appropriate.

Virginia's congressional districts prior to the last redistricting are described in the Census Bureau's geographic data. I will refer to these as "benchmark" districts.

In 2012, the General Assembly adopted new congressional districts in HB 251. I obtained the census block assignment file for HB 251, which describes the adopted districts in the census geography, from the General Assembly's redistricting website.

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[2] These data were modified from the original Census Bureau release due to the incorrect location of the Norfolk Naval Base in the census geography. *See* http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/Virginia/VA_errata%5B1%5D.pdf.

As implemented by the Census Bureau, beginning in 2000, individuals may identify themselves on the census as belonging to one or more of the five racial populations of American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. With some frequency, individuals identify themselves as belonging to more than one of these racial groups.

To address this situation, Office of Management and Budget (OMB) Bulletin No. 00-02 provides guidance on the allocation of multiple race responses for use in civil rights monitoring and enforcement. The Bulletin directs federal agencies to treat an individual who lists more than one race as belonging to the minority group that is the subject of the complaint or enforcement action under consideration.

The Department of Justice also has published a statement regarding allocation of multiple race categories in the Federal Register Notice "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c". The Department of Justice describes a process to evaluate Section 5 retrogression whereby a minority race population is calculated in two steps. First, the minority population is calculated as consisting of those persons who identify themselves as belonging to (1) the minority race alone and (2) the minority race and the White population. Second, other combinations of minority races will be considered if it appears there are significant numbers of responses among the other racial combinations. This Guidance was written prior to the release of the census population data in 2000. The Guidance language is couched in terms of what Department of Justice

expected—that the number of responses to multiple-race categories would be small.

Plaintiffs allege racial gerrymandering with respect to Black or African-American voters. Consistent with the OMB Bulletin and Department of Justice Guidance, I calculate two statistics for the Black or African-American voting-age population. First, I calculate Black or African-Americans as any response where Black is chosen alone or in one or more combinations with another race. I call this an inclusive method since it includes all individuals who identified themselves to the Census Bureau as Black or African-American. Second, I calculate Black or African-Americans as a combination of census responses identifying a person as Black or Black and White. I call this an exclusive method since it excludes some individuals who identified themselves to the Census Bureau as Black or African-American. While I believe that the inclusive method is the valid calculation consistent with the OMB Bulletin and DOJ Guidance for the voting rights allegations raised by Plaintiffs, I report the exclusive method calculations because the Virginia General Assembly reports them in their redistricting statistical reports.

Analysis Summary

I intend to present in my expert report evidence that the Third Congressional District was the product of an unlawful racial gerrymander. Specifically, I will show that race was the predominant factor in the creation of the adopted Third Congressional District. Even if the General Assembly wished to create a majority Black voting-age population Third Congressional District, the General Assembly was

not compelled to increase the Black voting-age population of the district. To that end, I will show that race predominated over traditional redistricting factors in the drawing of the boundaries of Third Congressional District. This will include an analysis of the racial composition and political performance of surrounding districts. Additionally, I will review the history of racial gerrymandering in the Third Congressional District.

Preliminary Analysis

I present here a preliminary analysis in support of my opinion that race was the predominant factor in the creation of the Third Congressional District by demonstrating how the Black voting-age population of the Third District was increased. I expect the following statistics will appear in my expert report.

In Table 1, I report population statistics for the Third Congressional District. I describe these statistics below.

	Total Pop.	Ideal Pop.	Dev.	VAP	Black VAP (Inclusive Method)	Black VAP (Exclusive Method)	%Black VAP (Inclusive Method)	%Black VAP (Exclusive Method)
Benchmark	663,390	727,366	-63,976	511,559	275,499	271,419	53.9%	53.1%
Adopted	727,366	727,366	0	560,158	320,210	315,604	57.2%	56.3%
Change from Benchmark to Adopted	63,976			48,599	44,711	44,185	3.3%	3.3%
%Black VAP of Net VAP Added to Benchmark					92.0%	90.9%		

Table 1. Selected Population Statistics for the Benchmark and Adopted Third Congressional District

The ideal population for a Virginia congressional district following the 2010 census is 727,366 persons.

Prior to the last redistricting, the benchmark Third Congressional District had 663,390 persons according to the 2010 census. The benchmark Third Congressional district thus deviated from the ideal population by 63,976 persons, and the General Assembly needed to add population to achieve population equality with other Virginia congressional districts.

Prior to the redistricting, the benchmark Third Congressional District had a total voting-age population (VAP) of 511,559 persons. As calculated using the inclusive method, 275,499 persons, or 53.9% of the VAP, identified themselves to the census as Black alone or in combination with any other race. As calculated using the exclusive method, 271,419 persons, or 53.1% of the VAP, identified themselves to the census as Black alone or Black and White. These statistics are the same as those reported by the General Assembly.[3] The inclusive method counts 4,080 additional persons over the exclusive method as identifying themselves as Black or African-American in the benchmark Third Congressional District.

The adopted Third Congressional district's total population is 727,366 persons, exactly equal to the ideal population for a Virginia congressional district, and represents an increase of 63,976 persons over the benchmark district.

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3 *See* http://redistricting.dls.virginia.gov/2010/Data/2010%20PL94-171/ current%20congress.htm.

Following the redistricting, the adopted Third Congressional District had a total voting-age population (VAP) of 560,158 persons. This represents an increase of 48,599 persons of voting-age over the benchmark district. As calculated using the inclusive method, 320,210 persons, or 57.2% of the VAP, identified themselves to the census as Black alone or in combination with any other race. This represents an increase of 3.3 percentage points over the benchmark district. As calculated using the exclusive method, 315,604 persons, or 56.3% of the VAP, identified themselves to the Census Bureau as Black alone or Black and White. This also represents an increase 3.3 percentage points over the benchmark district (the apparent discrepancy is due to rounding). These statistics are substantively the same as those reported by the General Assembly.[4] The inclusive method counts 4,606 additional persons over the exclusive method as identifying themselves as Black or African-American in the adopted Third Congressional District.

In order to increase the Black VAP from the benchmark to the adopted district, given that the benchmark district needed to add population, areas with substantially higher Black VAP than the benchmark district were added to the benchmark district. During the redistricting process, either 44,711 Blacks (inclusive method) or 44,185 (exclusive

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[4] *See* http://redistricting.dls.virginia.gov/2010/data/congressional%20plans/2012%20HB251_Bell/HB251_bell.htm. I calculate 315,604 Black or African-American persons of voting-age within the adopted Third Congressional District while the state legislature reports 315,603.1 have no explanation for this minor discrepancy.

method) of voting-age were added to the district. In other words, among the voting-age population added from the surrounding benchmark districts to the adopted Third Congressional District, 92.0% (inclusive method) or 90.9% (exclusive method) were Black or African-American.

In most circumstances, redistricting does not involve changing the boundaries of a single district in isolation to other districts. Table 2 presents population statistics for the population that was removed from the benchmark Third Congressional District into the surrounding adopted congressional districts and the population that was removed from the surrounding benchmark districts into the adopted Third Congressional District.

Benchmark to Adopted District	Total Pop	VAP	Black VAP (inclusive method)	Black VAP (exclusive method)	% Black VAP (inclusive method)	% Black VAP (exclusive method)
1 → 3	23,288	17,805	7,933	7,736	44.6%	43.4%
3 → 1	7,351	5,106	2,286	2,224	44.8%	43.6%
2 → 3	27,917	20,543	7,785	7,548	37.9%	36.7%
3 → 2	25,501	20,049	3,774	3,661	18.8%	18.3%
4 → 3	35,447	27,835	21,089	20,917	75.8%	75.1%
3 → 4	5,713	4,176	1,757	1,729	42.1%	41.4%
7 → 3	36,106	27,743	18,035	17,853	65.0%	64.4%
3 → 7	20,217	15,996	2,314	2,255	14.5%	14.1%
Net Change	63,976	48,599	44,711	44,185	92.0%	90.9%

Table 2. Population Movement Between Benchmark and Adopted Congressional Districts

Although the benchmark Third Congressional District needed to gain population, population was not only added to the adopted district from surrounding benchmark districts, population was also moved from the benchmark Third Congressional District into the surrounding adopted districts. The Third Congressional District needed to add population to reach population equality, so the population moved from the benchmark Third Congressional District into the surrounding adopting districts made the redistricting more complex since even more population would need to be added to the Third Congressional District in compensation for the population moved into surrounding adopted districts.

A simple strategy to increase the Black VAP of the adopted Third Congressional District might involve moving high density African-American communities into the adopted district from the surrounding benchmark districts. A sophisticated strategy to increase the Black VAP of the Third Congressional District further involves removing lower density Black VAP communities from the benchmark Third Congressional District and replacing them with higher density Black VAP communities from surrounding benchmark districts.

The sophisticated strategy of trading lower density Black VAP communities in the benchmark Third Congressional District with higher density Black VAP communities in the surrounding benchmark districts is evident in Table 2.

In the trades between the Third Congressional District and the Second, Fourth, and Seventh Congressional Districts, lower density Black VAP

communities were removed from the benchmark Third Congressional District and higher density Black VAP communities were added to the adopted Third Congressional District from these surrounding benchmark districts. The communities traded between the benchmark Third and First Congressional Districts appear to have substantially similar Black VAP, however these trades were part of a complex three-way trade that involved the Second Congressional District.

These trades of racial populations in the direction of adding higher density Black communities to the Third Congressional District and removing lower density Black communities demonstrates a pattern whereby race was the predominant factor in the drawing of the adopted Third Congressional District.

Expert Report of Dr. Michael P. McDonald

Page v. State Board of Elections

1. Biographical Information

I am Associate Professor of Government and Politics at George Mason University and a non-resident Senior Fellow at the Brookings Institution.

I have been involved in redistricting since the late 1980s when I prepared racial bloc voting analyses for the Department of Justice in *Garza v Los Angeles Board of Supervisors*. Since then I have been involved as a consultant to redistricting authorities or parties in litigation in fourteen states. I have also provided court testimony at trial or by deposition in a number of redistricting cases. Finally, I have produced numerous scholarly writings on the American electoral system. Please see my attached vita for more information regarding my academic publications and professional experience.

I have a specific interest in Geographic Information System applications to enable greater public participation in redistricting. I co-led a team with Dr. Micah Altman that developed award-winning open-source redistricting software called DistrictBuilder that allows users to draw districts through web-browsers. We deployed this software to support advocacy efforts and actual redistricting efforts by government officials in several jurisdictions within the United States and Mexico.

Among the government bodies that used our software was Virginia Governor Bob McDonnell's Independent Bipartisan Advisory Redistricting Commission, to which I also served as a mapping consultant. The

software was also deployed to support a Virginia college student redistricting competition that occurred concurrently with the Commission's and the General Assembly's redistricting deliberations.

I have been retained by Perkins Coie LLP on behalf of Plaintiffs in *Page v. Virginia State Board of Elections* to provide expert witness testimony regarding their challenge to Virginia's Third Congressional District as the product of an unlawful racial gerrymander. I am being compensated at a rate of $300/hr.

2. Executive Summary

This expert report presents evidence that the adopted Third Congressional District was the product of an unlawful racial gerrymander. First, it examines the geography of the district, specifically demonstrating how the district is not compact, not contiguous, and splits multiple counties, independent cities, and precincts. Second, it demonstrates that, notwithstanding the fact that the minority candidate of choice had consistently won landslide victories, the Virginia General Assembly strategically traded populations in and out of the Third Congressional District so as to *increase* the Black Voting Age Population of the District. Finally, the analysis compares the adopted Third District to the Third District deemed unconstitutional by a federal three-judge panel in 1997, demonstrating the striking similarities between both the goals and the results of the two districts.

In sum, the boundaries and composition of Virginia's Third Congressional District demonstrate that race predominated in the drawing of the District.

3. Background and Data Sources

A. Background

Following the 1990 census, the Commonwealth of Virginia created an African-American majority Third Congressional District that was further amended in 1993.

In 1997, this Third District became the subject of federal litigation in *Moon v. Meadows*. The Eastern District of Virginia three-judge panel found the Third District to be the product of an unlawful racial gerrymander and enjoined the conduct of any elections based on that District.

Following the 2010 redistricting, the General Assembly adopted a congressional redistricting plan in HB 251, that was approved by the Governor. The adopted Third District and surrounding Districts are the subjects of my expert report.

B. Population and Geographic Data Sources

I obtained from the Census Bureau Virginia's 2010 census population and geographic data produced in support of redistricting.[1] Virginia's congressional districts prior to the last redistricting are described in the Census Bureau's geographic data. I refer to these as "benchmark" districts.

In 2012, the General Assembly adopted new congressional districts in HB 251. I obtained the census block assignment file for HB 251, which

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[1] These data were modified from the original Census Bureau release due to the incorrect location of the Norfolk Naval Base in the census geography. *See* http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/Virginia/VA_errata%5B1%5D.pdf.

describes the adopted districts in the census geography, from the General Assembly's redistricting website.[2]

4. Geographical Description

In Figure 1, I provide a map of the adopted Third Congressional District. In Figures 2 through 5, I provide detailed maps of portions of the district. Figure 2 is a detailed map of Norfolk and Portsmouth. Figure 3 is a detailed map of Newport News and Hampton. Figure 4 is a detailed map of Petersburg, Prince George, and Surry. Figure 5 is a detailed map of Henrico and Richmond.

The adopted Third District is colored red. The adopted First District is yellow. The adopted Second District is Green. The adopted Fourth District is lavender. The adopted Seventh District is olive green.

Water is colored blue. To demonstrate where districts cross water, districts are overlaid onto the water such that the water has slightly different coloring depending on which district the water is assigned to. Water assigned to the adopted Third District appears with a purplish hue.

Virginia's counties and independent cities — what I refer to as "localities" — are labeled and outlined by a dark solid line.

Within localities are voting precincts, which I refer to as VTDs. VTD is short for "Voting Tabulation District," which is the Census Bureau's generic name

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[2] *See* http://redistricting.dls.virginia.gov/2010/ Redistricting Plans.aspx#31

for precincts, wards, and election districts. VTDs are outlined by a faint dotted line.

I identify significant connecting bridges in the Third District and adjacent districts as outlined yellow line segments.

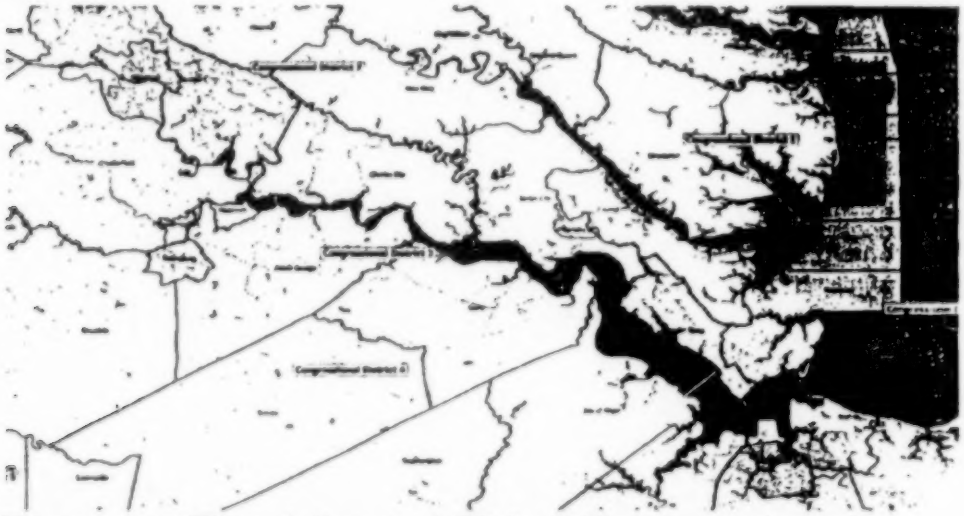

Figure 1. The Adopted Third Congressional District

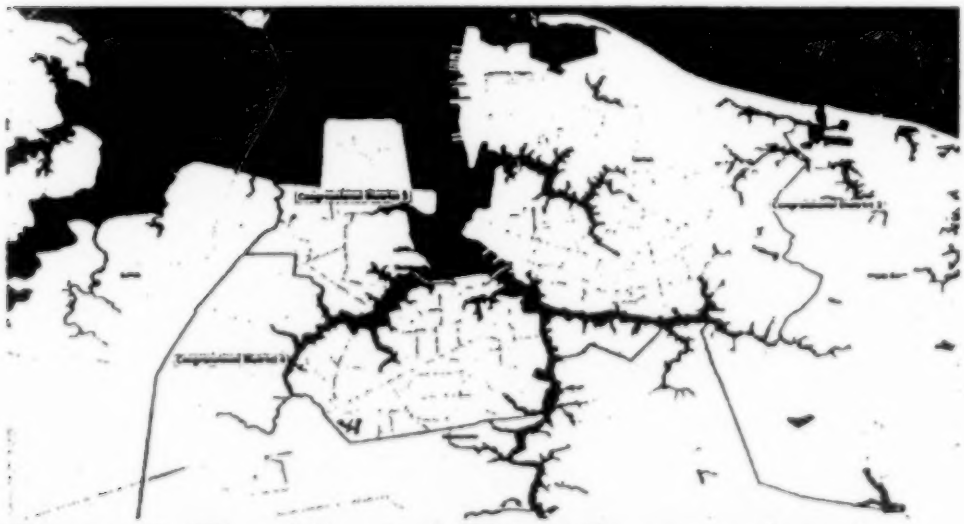

Figure 2. The Adopted Third Congressional District, Norfolk and Portsmouth Detail

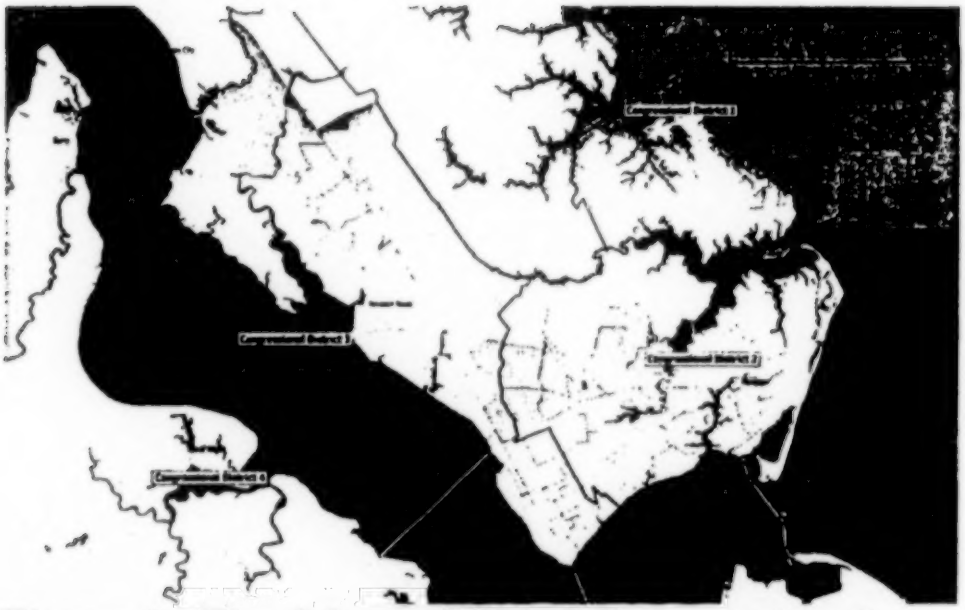

Figure 3. The Adopted Third Congressional District, Newport News and Hampton Detail

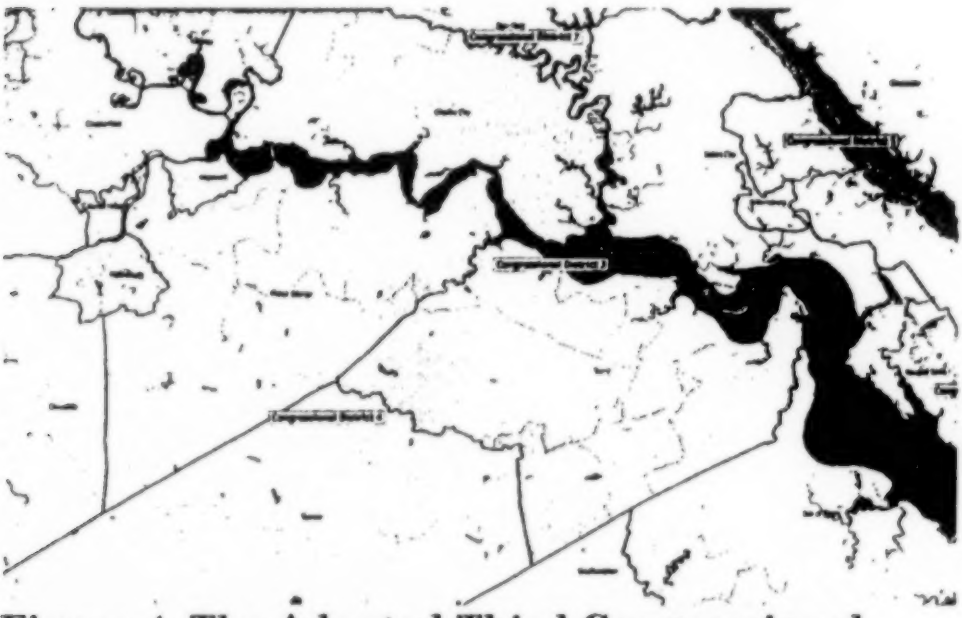

Figure 4. The Adopted Third Congressional District, Petersburg, Prince George, and Surry Detail

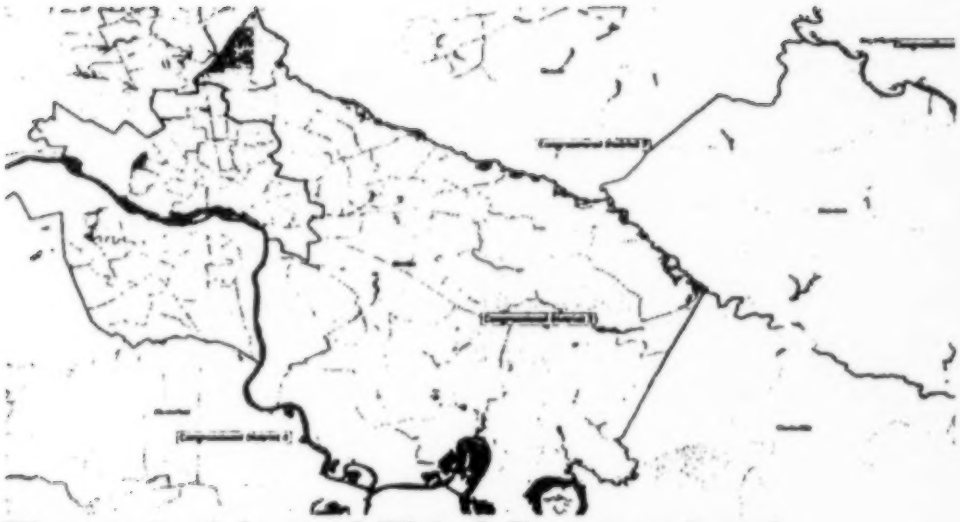

Figure 5. Adopted Third Congressional District, Henrico and Richmond Detail

The *Moon* Court described the physical geography of the unconstitutional Third District in these terms:

"The District has been aptly described as follows:

The Third Congressional District, as presently configured, is an amalgamation principally of African-American citizens contained within the legislatively determined boundaries for the obvious purpose of establishing a safe black district. The district is anchored in the tidewater cities of Norfolk, Suffolk, and Portsmouth. It crosses the Chesapeake Bay to include portions of the cities of Hampton and Newport News where the African-American population is the majority, using only the open water of the Chesapeake Bay and the James River to connect the disparate and non-contiguous portions of these two small cities. The District then crosses the James River into the largely rural Surry County, recrossing the James River to take in all of the African-American majority Charles City County. In Charles City County the district splits in three

directions. To the south the District runs through Prince George County and slices through the City of Hopewell, including only those areas where blacks predominate, before terminating some 30 miles away in the City of Petersburg, which it also divides racially. To the east, the District takes in part of rural southeastern Henrico County before reaching the more built up and heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a small black neighborhood in northern Henrico County. To the north, the district widens out to take all of the rural and agricultural counties of New Kent, King William, King and Queen, and ends its roughly 225 mile trek in Essex County along the banks of the Rappahannock River. (Pl.'s Complaint)."

The adopted Third District can be described in strikingly similar terms to the unconstitutional Third District.

The Third Congressional District, as presently configured, is an amalgamation principally of African-American citizens contained within the legislatively determined boundaries for the obvious purpose of establishing a safe black district. The district is anchored in the tidewater cities of Norfolk, Suffolk, and Portsmouth. It crosses the Chesapeake Bay to include portions of the cities of Hampton and Newport News where the African-American population is the majority, using only the open water of the Chesapeake Bay and the James River to connect the disparate and non-contiguous portions of these two small cities. The District then crosses the James River into the largely rural Surry County and dividing Prince George County. In Prince George

County, the District splits in two directions. To the south the District takes in all of the African-American majority City of Petersburg. To the north the District recrosses the James River to take in all of the African-American majority Charles City County. The District then takes in rural eastern Henrico County before reaching the more built up and heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a black neighborhood in northern Henrico County.

I examine below in greater detail the Third District's (1) compactness, (2) contiguity, (3) locality splits, and (4) Voting Tabulation District splits.

A. Compactness

In Table 1, I report the compactness of the adopted congressional districts. I report three commonly used compactness measures called the Reock Test, Polsby-Popper Test, and the Schwartzberg Test.

The Reock Test compares a district to a circle, considered by many to be the most compact shape. The test involves calculating the ratio of the area of a district to the area of the smallest circle that can be drawn around it. This ratio ranges between zero and one, with one being the most compact shape (in this case, the district is a circle). Thus, lower values of the Reock Test correspond with less compact districts.

The Polsby-Popper Test also compares a district to a circle. This test involves calculating the ratio of the area of a district to a circle with the same perimeter as the district. As with the Reock Test, a lower value indicate a less compact district.

The Schwartzberg Test also compares a district to a circle. This test involves calculating the ratio of the perimeter of the district to the perimeter of a circle with the same area. Unlike the two other compactness measures, higher values indicate less compact districts.

District	Reock	Polsby-Popper	Schwartzberg
1	0.28	0.18	2.09
2	0.27	0.20	2.09
3	0.19	0.08	3.07
4	0.32	0.20	2.04
5	0.30	0.15	2.30
6	0.26	0.16	2.17
7	0.30	0.13	2.34
8	0.37	0.26	1.76
9	0.20	0.18	2.13
10	0.29	0.12	2.60
11	0.23	0.09	3.06

Table 1. Compactness of Adopted Congressional Districts

Table 1 illustrates the adopted Third District is an extreme district on all three compactness measures. By any of these measures, the adopted Third Congressional District is the least compact of any adopted district, with a Reock Test score of 0.19, a Polsby-Popper Test score of .08 and a Schwartzberg Test score of 3.07.

B. Contiguity

Contiguity means that all parts of a district are connected. Specifically, a district is contiguous if any part of the district can be reached from any other

part without crossing the district boundary — in other words, if the district is not divided into two or more discrete pieces.

Figure 1 demonstrates that the adopted Third District is contiguous at points only by virtue of being connected via water, particularly the James River, without a connecting bridge. Furthermore, the adopted Second District's contiguity is affected by the shape of adopted Third District.

As Figure 2 illustrates, the adopted Second District wraps around the north end of the Norfolk portion of the adopted Third District, crossing Willoughby Bay without a connecting bridge. As the Second District continues to wrap around the Third District, it crosses the Lafayette River without a connecting bridge.

As Figure 3 illustrates, the Second District then crosses the James River to Hampton. Although there is a connecting bridge and tunnel, the northern terminus of the bridge is in the Third District. The Second Congressional District then wraps around the Third District on the northern portion of Hampton crossing the Southwest Branch Back River, this time connected by a bridge.

The Third District is connected from Portsmouth by bridges across intervening water to Norfolk and Hampton. However, further along the west of the James River, only water connects the Hampton and Newport News portions of the Third District. Likewise, only water connects the Newport News and Surry portions of the Third District.

Figure 4 shows that the Third District again crosses the James River just to the east to Hopewell. It is

not clear from the Census Bureau's geographical data if the Third Congressional District is connected across the James River between Prince George and Charles City. The Third District's boundary stops at a bridge, but there is insufficient geospatial information to determine if the eastern portion of the bridge is indeed contained in the Third District.

C. Locality Splits

I refer to Virginia's Counties and Independent Cities as "localities," which are defined in the Census Bureau's geography. If a district does not entirely contain a geography, in this case a locality, within its borders, the geography is considered to be "split" by the district.

Seventeen (17) localities are split by all adopted Districts.

In Table 2, I calculate the number of times each adopted District splits a Virginia locality and the number of locality splits that involve the Third Congressional District.

District	Number of Locality Splits by District	Number of Locality Splits Involving CD3
1	5	2
2	3	3
3	9	9
4	4	3
5	3	
6	2	
7	4	2

8	1	
9	2	
10	2	
11	2	

Table 2. Localities Split by Adopted Congressional Districts

The adopted Third District splits nine localities, the most of any adopted district. The next largest number of locality splits are by the First Congressional District, with five, then the Fourth and Seventh Congressional Districts, with four apiece. The adopted Second Congressional district splits three localities.

The adopted Third District contributes to the higher number of locality splits with its surrounding districts. All three of the adopted Second District's locality splits involve the Third District. Three of four of the adopted Fourth District's locality splits involve the Third District. Two of four of the adopted Seventh District's locality splits involve the Third District. Two of five of the adopted First District's locality splits involve the Third District.

The statistics presented in Table 2 illustrate that a typical adopted Virginia Congressional District splits at most three localities. The adopted Third District is an anomaly. The Third District splits nine localities, the most of any district. Since another district must be involved in a split, the districts adjacent to the Third Congressional District have a higher number of locality splits due to the unusually large number of

locality splits involving the Third Congressional District.

In determining that race was the predominant factor in the creation of the unconstitutional Third District, the *Moon* Court noted that "[a]s of 1993, the Congressional district plan splits some 21 independent cities and counties, with more than half of those county and city splits (11) in the Third District." 952 F. Supp. at 1148. Similarly here, the adopted Third District splits 17 independent cities and counties, with more than half of those locality splits in the adopted Third District.

District	Number of VTD Splits by District	Number of VTD Splits Involving CD3
1	4	1
2	5	5
3	14	14
4	7	7
5	3	
6	1	
7	2	1
8	2	
9	1	
10	2	
11	3	

Table 3. Voting Tabulation District Splits by Adopted Congressional Districts

D. Voting Tabulation District Splits

In Table 3, I calculate the number of times Virginia Voting Tabulation Districts (VTDs) are split by the adopted districts and the number of VTD splits that involve the Third District.

Twenty (20) VTDs are split by all adopted Districts.

The adopted Third District splits fourteen VTDs, the most of any adopted district. The next largest number of VTD splits are in the Fourth District, with seven, then the Second District, with five, and the First District, with four. The adopted Seventh District splits two VTDs.

The Third District contributes to the higher number of VTD splits in its surrounding districts. All seven of the Fourth District's VTD splits involve the Third Congressional District, as do all five of the VTD splits of the Second District. One of four of the First District's VTD splits involves the Third Congressional District. One of two of the Seventh District's locality splits involves the Third Congressional District.

The statistics presented in Table 3 illustrate that, without factoring in the Third District, a typical adopted Virginia Congressional District splits, at most, three VTDs. The adopted Third District is again an extreme outlier, as it is with locality splits presented in Table 2. The Third Congressional District splits 14 VTDs, twice as many as any other district. Since another district must be involved in a split, the districts adjacent to the Third District — particularly the Second and Fourth Districts — have a higher number of locality splits due to the unusually large number of locality splits involving the Third District.

In its determination that race was the predominant factor in the creation of the unconstitutional Third District, the *Moon* Court noted that "the entire State's redistricting had only 54 split precincts, but 37 of them were in the Third District." 952 F. Supp. at 1148. Similarly here, the adopted Congressional District plan has only 20 VTD splits, but 14 of them are within the Third District.

E. Summary

The adopted Third Congressional District is bizarrely shaped. It is the least compact of all the adopted

congressional districts. At least at two points, perhaps three, it is contiguous only across water without a connecting bridge. The adopted Third District is involved in a majority of the locality and VTD splits across all adopted Districts.

These are all factors that the *Moon* Court considered when determining that Virginia used race as the predominant factor when adopting the Third District in 1993.

Furthermore, the bizarrely shaped Third Congressional District negatively affects the Second Congressional District's contiguity. At three points the Second Congressional District wraps around the Third Congressional District in a manner that traverses water without a connecting bridge.

5. Historical Performance of Candidates to the Third District

Candidate	2002	2004	2006	2008	2010	2012
Rep. Bobby Scott	96.1%	69.3%	96.1%	97.0%	70.0%	81.3%
Republican Opponent		30.5%			27.2%	18.5%
Other Candidates	3.9%	0.1%	3.9%	3.0%	2.8%	0.3%

Table 4. Election Results for the Third Congressional District, 2002-2012

As reported in Table 4, the African-American candidate in the Third District, and presumably African-American candidate of choice, Rep. Bobby Scott was reelected to the district from 2002 to 2012 with an average vote share of 85.0%. In the 2010 election, a historically good election for Republican candidates nationwide, Rep. Scott received 70.0% of the vote. In the subsequent election, following the increase of the Black voting-age population of the Third District, Rep. Scott received 81.3% of the vote.

Rep. Scott has won overwhelmingly lopsided election victories in the benchmark and adopted Third District before the recent redistricting. The increase of the Black voting-age population of the Third District is thus at face value not needed to continue to elect the African-American candidate of choice.

The Commonwealth of Virginia did not include in its Section 5 submission to the Department of Justice an analysis to determine if the Black voting-age population of the benchmark Third District needed to be increased in order for the African-American community to continue to elect a candidate of choice. Other jurisdictions in the United States have performed such analyses. In South Carolina, for example, a "to elect" analysis of State Senate District 10 found that a Black voting-age population of 33.3% was effective for the African-American community to have the ability to elect candidates of its choice, and the Department of Justice approved the district.[3]

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[3] Exhibit 14 of South Carolina's Section 5 submission, "Retrogression Analysis for the South Carolina Senate Districting Plan Adopted in 2001" by Richard L. Engstrom, July 27, 2011.

As analyses in other states demonstrate, the Black voting-age population of the Third District needed to elect an African-American candidate of choice may be substantially lower than the adopted or even benchmark Third District's Black voting-age population.

6. The Black Voting-Age Population of the Third District Was Strategically Increased

In addition to an examination of the shape of the Third District, the Court's analysis in *Moon v. Meadows* examined how "[t]hroughout the redistricting process, the Legislature sought to protect and indeed enhance this initial ratio [of Black population]." 952 F. Supp. at 1146. The Court examined changes to the District adopted by the General Assembly through amendments by the Governor — Virginia's Governor has amendatory veto power — and through subsequent amendments to the district in 1993. The Court found these moves were further evidence of "Virginia's predominant attention to the principal goal of creating a safe black district" *Id.*

I perform a similar analysis as the *Moon v. Meadows* Court, using the benchmark Third District as the baseline for comparison. I begin by describing important aspects of the data and proceed with analyzing trades made between the Third District and surrounding Districts.

Notwithstanding the historical performance of the African-American candidate of choice in the Third District, the General Assembly increased the Black voting-age population of the District.

In my opinion, similar to the process observed by the *Moon v. Meadows* Court, Virginia traded population among the Third and surrounding Districts with the purpose of increasing the Black voting-age population of the adopted Third District.

A. Defining the Black Voting-Age Population

Prior to the 2000 census individuals could identify themselves as one - and only one - of five racial populations: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or White.

Beginning with the 2000 census, individuals may identify themselves as belonging to one or more of the five racial populations. With some frequency, individuals identify themselves as belonging to more than one of these racial groups.

To address the potential non-comparability of race statistics, the Office of Management and Budget (OMB) issued Bulletin No. 00-02, which provides guidance on the allocation of multiple-race responses for use in civil rights monitoring and enforcement. The Bulletin directs federal agencies to treat an individual who lists more than one race as belonging to the minority group that is the subject of the complaint or enforcement action under consideration.

The Department of Justice also has published a statement regarding allocation of multiple-race categories in the Federal Register Notice "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973 c". The Department of Justice describes a process to evaluate Section 5 retrogression whereby a minority race population is calculated in two steps. First, the

minority population is calculated as consisting of those persons who identify themselves as belonging to (1) the minority race alone and (2) the minority race and the White population. Second, other combinations of minority races will be considered if it appears there are significant numbers of responses among the other racial combinations. This Guidance was written prior to the release of the census population data in 2000. The Guidance language is couched in terms of what Department of Justice expected – that the number of responses to multiple-race categories would be small.

Plaintiffs allege racial gerrymandering with respect to Black or African-American voters. Virginia congressional districts are drawn to equalize total population. Voting rights questions involve voters, and thus minority voting rights analyses primarily examine the voting-age population (VAP) of the minority group at issue.

Consistent with the OMB Bulletin and Department of Justice Guidance, I calculate two statistics for the Black VAP. First, I calculate Black VAP as a combination of census responses identifying a person as Black or Black and White. I call this the "exclusive" method since it excludes some multi-race individuals who identified themselves to the Census Bureau as African-American. Second, I calculate Black VAP as any response where Black is chosen alone or in combination with one or more other races. I call this the "inclusive" method since it includes all individuals who identified themselves to the Census Bureau as African American.

It is my opinion that the inclusive method is the valid calculation consistent with the OMB Bulletin and DOJ Guidance for the voting rights allegations raised by Plaintiffs. I report these statistics alongside the exclusive method calculations, as the Virginia General Assembly reports only the exclusive method calculations in their redistricting statistical reports.

B. Population of Adopted and Benchmark Third District

In Table 5, I report population statistics for the benchmark and adopted Third Congressional District.

The ideal population for each Virginia congressional district following the 2010 census is 727,366 persons. Prior to the last redistricting, the benchmark Third District had 663,390 persons according to the 2010 census. The benchmark Third District needed to add 63,976 persons to achieve population equality with other Virginia congressional districts.

	Total Pop.	Ideal Pop.	Deviation	VAP	Black VAP (Exclusive Method)	Black VAP (Inclusive Method)	%Black VAP (Exclusive Method)	%Black VAP (Inclusive Method)
Benchmark	663,390	727,366	-63,976	511,559	271,419	275,499	53.1%	53.9%
Adopted	727,366	727,366	0	560,158	315,604	320,210	56.3%	57.2%
Change from Benchmark to Adopted	63,976			48,599	44,185	44,711	3.3%	3.3%
%Black VAP of Net VAP Added to Benchmark District					90.9%	92.0%		

Table 5. Selected Population Statistics for the Benchmark and Adopted Third Congressional District

Prior to the redistricting, the benchmark Third District had a total voting-age population of 511,559 persons. As calculated using the exclusive method, 271,419 of those persons were Black, or 53.1% of the VAP. As calculated using the inclusive method, 275,499 of those persons were Black, or 53.9% of the VAP. The inclusive method counts 4,080 additional voting-age persons over the exclusive method as identifying themselves as Black or African-American in the benchmark Third District.

The adopted Third District's total population is 727,366 persons, exactly equal to the ideal population for a Virginia congressional district, and represents an increase of 63,976 persons over the Benchmark Third District.

Following the redistricting, the adopted Third District had a voting-age population of 560,158 persons. This represents an increase of 48,599 persons of voting-age over the benchmark Third District. As calculated using the exclusive method, 315,604 of those persons were Black, or 56.3% of the VAP. This represents an increase 3.3 percentage points over the benchmark Third District (the apparent discrepancy is due to rounding). As calculated using the inclusive method, 320,210 of those voting-age persons were Black, or 57.2% of the VAP. This also represents an increase of 3.3 percentage points over the benchmark district. The inclusive method counts 4,606 additional voting-age persons over the exclusive method as identifying themselves as Black in the adopted Third District.

C. Detailed Changes to the Third District

For Virginia to increase the Black VAP from the Benchmark to the Adopted Third District, given that the benchmark Third District required additional population, areas with substantially higher Black VAP than the benchmark Third District were added to the benchmark district. During the redistricting process, either a net of 44,185 (exclusive method) or 44,711 (inclusive method) Blacks of voting-age were added to the district. In other words, among the net voting-age population added from the surrounding benchmark districts to the adopted Third District, 90.9% (exclusive method) or 92.0% (inclusive method) were Black.

Four congressional districts are adjacent to the benchmark Third District: the First, Second, Fourth, and Seventh. While the Black voting-age population of the adopted Third District was increased relative to the benchmark district, all four of these adjacent districts saw a decrease in Black voting-age population percentages. The Black VAP of the First District decreased 2.6 percentage points (either method), the Second District decreased 0.2 percentage points (either method), the Fourth District decreased 2.2 percentage points (either method), and the Seventh District decreased 2.4 percentage points (either method).

Table 6 presents population statistics for the population that was removed from the benchmark Third District into the surrounding adopted congressional districts and the population that was removed from the surrounding benchmark districts into the adopted Third Congressional District.

Benchmark to Adopted District	Total Pop	VAP	Black VAP (exclusive method)	Black VAP (inclusive method)	% Black VAP (exclusive method)	% Black VAP (inclusive method)
1 → 3	23,288	17,805	7,736	7,933	43.4%	44.6%
3 → 1	7,351	5,106	2,224	2,286	43.6%	44.8%
2 → 3	27,917	20,543	7,548	7,785	36.7%	37.9%
3 → 2	25,501	20,049	3,661	3,774	18.3%	18.8%
4 → 3	35,447	27,835	20,917	21,089	75.1%	75.8%
3 → 4	5,713	4,176	1,729	1,757	41.4%	42.1%
7 → 3	36,106	27,743	17,853	18,035	64.4%	65.0%
3 → 7	20,217	15,996	2,255	2,314	14.1%	14.5%
Net Change to Third District	63,976	48,599	44,185	44,711	90.9%	92.0%

Table 6. Population Movement Between Benchmark and Adopted Congressional Districts

Although the benchmark Third District needed to gain population, population was not only added to the adopted Third District from surrounding benchmark districts, population was also moved *from* the benchmark Third Congressional District into the surrounding adopted districts. Since the Third District needed to add population to reach population equality, the population moved from the benchmark Third District made the redistricting more complex, as even more population needed to be added to the Third District to compensate for the population removed from the District.

A simple strategy to increase the Black VAP of the adopted Third District might involve moving high density African-American communities into the district from the surrounding benchmark districts. A sophisticated strategy to increase the Black VAP of the adopted Third District further involves removing lower density Black VAP communities from the benchmark Third District and replacing them with higher density Black VAP communities from surrounding benchmark districts.

The sophisticated strategy of trading lower density Black VAP communities in the benchmark Third District with higher density Black VAP communities in the surrounding benchmark districts is evident in Table 6.

In the trades between the Third District and the Second, Fourth, and Seventh Districts, lower density Black VAP communities were removed from the benchmark Third Congressional District and higher density Black VAP communities were added to the adopted Third District from these surrounding

benchmark districts. The communities traded between the benchmark Third and First Districts appear to have substantially similar Black VAP, however these trades were part of a complex three-way trade that involved the Second District.

I discuss below trades of population and geography between the (1) First and Third Districts, (2) Second and Third Districts, (3) Fourth and Third Districts, and (4) Seventh and Third Districts.

Figures 6 through 10 illustrate changes to the benchmark and surrounding Districts. The adopted congressional districts are presented in the same color scheme as before. Benchmark congressional district boundaries are presented as red lines. Locality boundaries are presented as black lines and VTD boundaries are presented as gray lines. Water is colored blue and shaded according to adopted district colors. Bridges are presented as yellow.

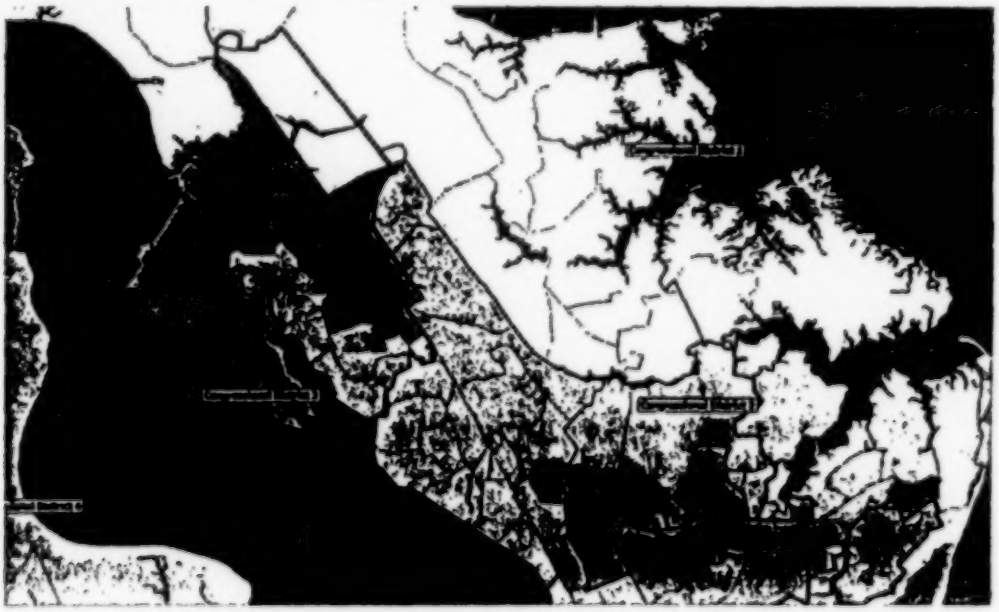

Figure 6. Geography Trades between the First and Third Districts

(1) Trades between the First and Third Districts

Trades between the First and Third Districts primarily involved a complex trade between the First and Second Districts. Race predominated in these trades in how Hampton and Newport News population formerly assigned to the benchmark First District was segregated along racial lines, with predominantly White population given to the Second District and predominantly Black population given to the Third District.

Prior to the redistricting, the benchmark First and Third Districts shared common borders in Hampton and Newport News. The adopted First District's southern border was removed entirely from Hampton and almost entirely from Newport News.

Much of the Newport News territory surrendered by the First District is predominantly White according to the 2010 census. Giving this population to the adopted Third District would have avoided the necessity of linking the Hampton and Newport News portions of the Third District via the James River with no connecting bridge. Instead, the General Assembly chose to wrap the adopted Second District around the Hampton portion of the adopted Third District, at one point creating a narrow neck less than a mile wide. This neck then enabled the General Assembly to segregate Newport News along racial lines between the Second and Third Districts.

Fifteen of sixteen whole Newport News VTDs formerly in the benchmark First District were assigned to the adopted Second District, plus parts of

three more VTDs formerly split between the benchmark First and Third Districts. One whole VTD formerly in the benchmark First District was assigned to the adopted Third District.

The single Newport News VTD formerly located in the benchmark First District assigned to the adopted Third District — South Morrison — has the highest Black voting-age population of any of the whole VTDs formerly located in the benchmark First District. South Morrison has a total population of 4,473 persons, a VAP of 3,267 persons, and a Black VAP of 46.9% (exclusive method) or 48.1% (inclusive method).

The total of all other Newport News population formerly located in the benchmark First District and assigned to the Second District has a total population of 70,701 persons, a VAP of 55,944 persons, and a Black VAP of 22.6% (exclusive method) or 23.1% (inclusive method).

Three of six whole Hampton VTDs formerly in the benchmark First District were assigned to the Second District and the remaining three whole VTDs were assigned to the Third District. A part of one VTD in Hampton was split between the Second and Third.

The four Hampton VTDs formerly located in the benchmark First District and assigned to the adopted Second District (three wholly and one in part) have a total population of 12,897 persons, a VAP of 9,774 persons, and a Black VAP 44.6% (exclusive method) or 45.7% (inclusive method).

The four Hampton VTDs formerly located in the benchmark First District and assigned to the adopted Third District (three wholly and one in part) have a

total population of 18,815 persons, a VAP of 14,538 persons, and a Black VAP 42.7% (exclusive method) or 43.8% (inclusive method).

The Hampton population assigned from the benchmark First District to the adopted Third District has a slightly lower Black VAP percentage than the population assigned to the adopted Second District — 2.0 percentage points lower by either calculation method. At the same time, however, the geography assigned to the adopted Second District is less densely populated, such that although both the adopted Second and Third Districts were each assigned three VTDs formerly in the benchmark First District and one was split between them, 5,918 fewer Hampton residents formerly in the benchmark First District were assigned to the Second District compared to the Third District. The lower total population gain realized in the Second District's connection through Hampton meant a larger number of Newport News Whites could be added to the Second District, thereby more than offsetting the slightly higher Hampton Black VAP percentage formerly in the First District assigned to the Second District.

One whole Newport News VTD formerly assigned to the benchmark Third District was assigned to the First District. Additionally, a portion of Greenwood was assigned to the adopted First District (a very small portion of this VTD was formerly split between the benchmark First and Third Districts). A small portion of one York County VTD — Magruder — formerly located in the benchmark Third District was also assigned to the adopted First District. (It is

appropriate to mention this York VTD here since it is contiguous to the Newport News VTDs.)

The total of these three assignments of VTD portions from the benchmark Third District to the adopted First District are reported in Table 6 and have a total population of 7,351 persons, a VAP of 5,106 persons, and a Black VAP of 43.6% (exclusive method) or 44.8% (inclusive method).

The population moved from the benchmark First District to the adopted Third District have a total population of 23,288 persons, a VAP of 17,805 persons, and a Black VAP of 43.4% (exclusive method) or 44.6% (inclusive method).

There may appear to be no racial component to the trades between the First and Third Districts from the Table 6 statistics since a slightly higher BVAP percentage was transferred into the First District. However, race played a role. Predominantly White Newport News VTDs could have been given to the adopted Third District when the benchmark First District was removed from these localities. This population was instead given to the adopted Second District. The Newport News population that was given to the adopted Third District had the highest Black VAP of any VTD in the benchmark First District.

Furthermore, the adopted Second District was made contiguous to Newport News by way of a low-population mile-wide finger wrapping around the Hampton portion of the adopted Third District. Indeed, as described in the next section, even further segregation of Newport News was enabled by this configuration since the adopted Second District was

now able to take additional predominately White Newport News population from the benchmark Third District.

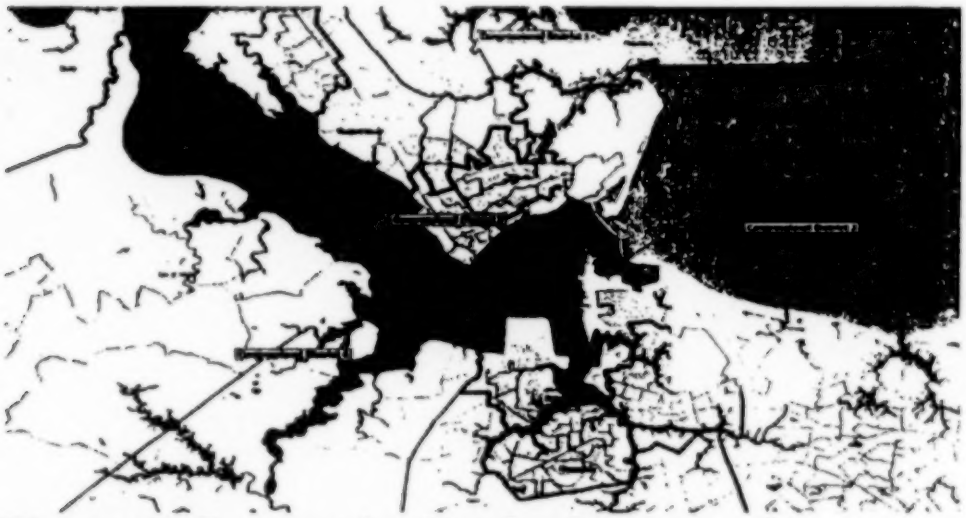

Figure 7. Geography Trades between the Second and Third Districts

(2) Trades between the Second and Third Districts

As reported in Table 6, population trades between the Second and Third Districts further segregated these districts' populations along race by moving higher Black VAP areas from the benchmark Second District into the adopted Third District in exchange for lower Black VAP territory moved from the benchmark Third District to the adopted Second District. Furthermore, these trades reduced the compactness of the Second and Third Districts and resulted in three instances where the Second District is contiguous by water with no connecting bridge.

The population moved from the benchmark Second District to the adopted Third District had a total population of 27,917 persons, a VAP of 20,543 persons, and a Black VAP of 36.7% (exclusive method) or 37.9% (inclusive method).

The population moved from the benchmark Third District to the adopted Second District had a total population of 25,501 persons, a VAP of 20,049 persons, and a Black VAP of 18.3% (exclusive method) or 18.8% (inclusive method).

I review below trades between the Second and Third Districts, which occurred in the localities of (a) Newport News, (b) Norfolk, and (c) Hampton.

a. Newport News

In Newport News, all trades between the Second and Third Districts involved moving predominantly White population from the benchmark Third District to the adopted Second District. Four whole VTDs and parts of two others were assigned from the benchmark Third District to the adopted Second District.

Furthermore, these trades resulted in a less compact alignment of the Second and Third Districts as an arm of the adopted Second District was extended along the James River shore. While it may appear from visual inspection that a sizable VTD connects the Newport News portion of the adopted Third District to the James River, all but a small sliver on the northern end of the shore has zero-population.

These trades from the benchmark Third District to the adopted Second District resulted in moving a total population of 17,745 persons, a VAP of 13,592 persons, and a Black VAP of 19.1% (exclusive method) or 19.7% (inclusive method).

As described in the section above regarding trades between the First and Third Districts, none of these trades between the Second and Third Districts would have been possible if the Second District had not been connected to Newport News through a complex

series of trades with the benchmark First District. Thus, trades between the First and Third Districts should not be viewed in isolation since they enabled the adopted Second District to take predominantly White Newport News population from the benchmark Third District.

b. Norfolk

In Norfolk, trades between the Second and Third District involved moving higher density Black VAP areas from the benchmark Second to adopted Third District in exchange for lower density Black VAP areas from the benchmark Third to the adopted Second District. Furthermore, these trades negatively affected the compactness of both districts and created three portions of the adopted Second District to be connected by water with no connecting bridge.

Three whole VTDs and a part of one were assigned from the benchmark Second District to the adopted Third District. At the same time, three whole VTDs were assigned from the benchmark Third District to the adopted Second District.

In sum, the Norfolk population shifts from the benchmark Second District to the adopted Third District resulted in moving a total population of 13,791 persons, a VAP of 9,694 persons, and a Black VAP of 35.0% (exclusive method) or 36.0% (inclusive method).

In sum, the Norfolk population shifts from the benchmark Third District to the adopted Second District resulted in moving a total population of 8,026 persons, a VAP of 64,57 persons, and a Black VAP of

16.6% (exclusive method) or 16.9% (inclusive method).

Reassignment of four Norfolk VTDs exemplify how the reconfiguration had a negative effect on the traditional redistricting principles of compactness and contiguity. One VTD, Titustown Center. was moved from the benchmark Second District to the adopted Third District. Three VTDs with roughly similar population — Suburban Park, Willard, and Lafayette — were moved from the benchmark Third District to the adopted Second District.

Titustown Center has 7,528 persons, of whom 4,990 are of voting-age, and among the voting-age population 1,649 (exclusive method) or 1,700 (inclusive method) persons are African-American or Black. The Black percentage of the voting-age population is 33.0% (exclusive method) or 34.1% (inclusive method).

Suburban Park, Willard, and Lafayette combined have a total population of 8,026 persons, of whom 6,467 are of voting-age, and among the voting-age population 1,070 (exclusive method) or 1,093 (inclusive method) persons are African-American or Black. The Black percentage of the voting-age population is 16.6% (exclusive method) or 16.9% (inclusive method).

The reconfiguration of these four VTDs caused two portions of the adopted Second District to be connected across water, with no connecting bridge. Following the assignment of Titustown Center from the benchmark Second District to the adopted Third District, the western Norfolk portion of the adopted Second District is contiguous to the remainder of the

district only across Willoughby Bay, with no connecting bridge. Following the assignment of Suburban Park, Willard, and Lafayette from the benchmark Third District to the adopted Second District, these three precincts are contiguous to the Second District only across the Lafayette River, with no connecting bridge.

A simple visual inspection reveals that the benchmark Second District divided Norfolk with the benchmark Third District in a more compact manner than the adopted districts. Following the redistricting, the adopted Second District wraps around four VTDs assigned to the adopted Third District so that Suburban Park, Willard, and Lafayette may be assigned to the adopted Second District.

In sum, traditional redistricting principles were subsumed to race to accomplish this move, which results in visually less compact districts and an adopted Second District that must twice traverse water without a bridge.

c. Hampton

In Hampton, all trades between the Second and Third Districts involved moving population from the benchmark Second District to the adopted Third District. Four whole VTDs and a portion of one VTD were assigned from the benchmark Second District to the adopted Third District.

These trades from the benchmark Second District to the adopted Third District resulted in moving a total population of 14,126 persons, a VAP of 10,849 persons, and a Black VAP 38.3% (exclusive method) or 40.0% (inclusive method).

The reassignment of these VTDs simultaneously improved and degraded the connectedness of the adopted Second and Third Districts over water. A portion of the benchmark Second District formerly connected only via the James River was assigned to the adopted Third District. However, the assignment of the whole VTD at the northern terminus of the Hampton Roads Bridge-Tunnel — Pheobus — from the benchmark Second District to the adopted Third District resulted in all of the Hampton and Newport News portions of the adopted Second District to be connected by water without a connecting bridge to the remainder of the Second District.

Figure 8. Geography Trades between the Third and Fourth Districts

(3) Trades between the Fourth and Third Districts

Trades between the Fourth and Third Districts are located in Prince George and Petersburg. The primary result of these trades was to move the entirety of the densely African-American community of Petersburg from the benchmark Fourth District to the adopted Third District.

The population moved from the benchmark Fourth District to the adopted Third District had a total population of 35,447 persons, a VAP of 27,835 persons, and a Black VAP of 75.1% (exclusive method) or 75.8% (inclusive method).

The population moved from the benchmark Third District to the adopted Fourth District had a total population of 5,713 persons, a VAP of 4,176 persons, and a Black VAP of 41.4% (exclusive method) or 42.1% (inclusive method).

In Prince George, the whole of one VTD and a portion of another were assigned from the benchmark Third District to the adopted Fourth District. A portion of one VTD was assigned from the benchmark Fourth District to the Third District. Although the net of the Prince George changes alone is largely a wash,[4] the assignment of this latter portion enabled the whole of densely-Black Petersburg to be assigned from the benchmark Fourth District to the adopted Third District.

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[4] The Prince George population shifts from the benchmark Third District to the adopted Fourth District resulted in moving a total population of 5,713 persons, a VAP of 4,176 persons, and a Black VAP of 41.4% (exclusive method) or 42.1% (inclusive method). The Prince George population shifts from the benchmark Fourth District to the adopted Third District resulted in moving a total population of 3,027 persons, a VAP of 2,122 persons, and a Black VAP of 40.3% (exclusive method) or 41.2% (inclusive method).

Figure 9. Geography Trades between the Third and Fourth Districts, Unconstitutional 1990s District Boundary in Green.

The Petersburg population shifts from the benchmark Fourth District to the adopted Third District resulted in moving a total population of 32,420 persons, a VAP of 25,713 persons, and a Black VAP of 78.0% (exclusive method) or 78.6% (inclusive method).

The assignment of Petersburg to the adopted Third District is similar to the unconstitutional District at issue in *Moon v. Meadows*. To demonstrate, I overlay in Figure 11 the unconstitutional Districts, identified by a dark green line, onto the adopted Districts, colored as before.

The unconstitutional Third District extended from Charles City through portions of Prince George to connect to then-predominantly Black portions of Petersburg. The adopted Third District similarly extends through portions of Prince George to connect all of Petersburg.

The unconstitutional Third District split Petersburg, while the adopted Third District does not. Because Petersburg has become more densely Black since the 1990s census, the end result is still the same: adding densely-Black Petersburg population to the Third District.

1990 census statistics for Petersburg were provided by Plaintiffs' counsel to me in a document with the file name "1998 - Book 1.pdf," provided by the Division of Legislative Services. In 1990, the lowest Black voting-age percentage of any Petersburg VTD was Ward Three, Precinct Two, with 22.1% BVAP. Four of 14 VTDs had BVAP below fifty percent.

As of the 2010 census, the Petersburg VTD with the smallest Black voting-age population is the Third Ward, First Precinct, with a Black VAP of 67.3% (exclusive method) or 67.6% (inclusive method).

With Petersburg now so heavily African-American, there is less need to divide the locality if one has the intent to concentrate African-Americans into a district.

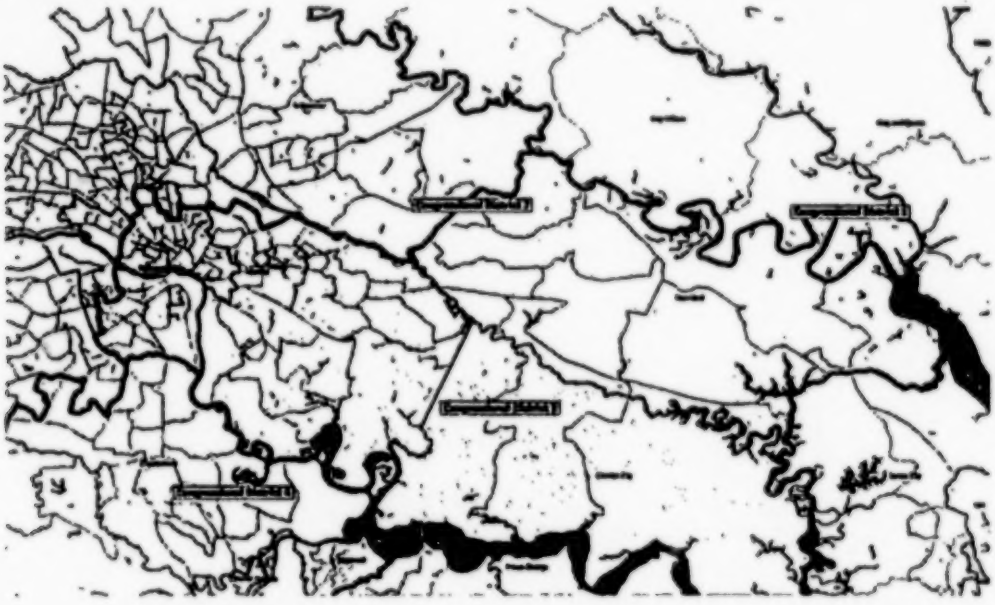

Figure 10. Geography Trades between the Third and Seventh Districts

(4) Trades between the Seventh and Third Districts

Trades between the Seventh and Third Districts primarily involved shifting lower Black VAP New Kent and one Richmond VTD from the benchmark Third District to the adopted Seventh District in exchange for much higher Black VAP VTDs moved from the benchmark Seventh District to the adopted Third District in Henrico and Richmond.

The population moved from the benchmark Seventh District to the adopted Third District had a total population of 36,101 persons, a VAP of 27,743 persons, and a Black VAP of 64.4% (exclusive method) or 65.0% (inclusive method).

The population moved from the benchmark Third District to the adopted Seventh District had a total population of 20,217 persons, a VAP of 15,996 persons, and a Black VAP of 14.1% (exclusive method) or 14.5% (inclusive method).

The whole of New Kent was moved from the benchmark Third District to the adopted Seventh District. These New Kent population shifts from the benchmark Third District to the adopted Seventh District resulted in moving a total population of 18,429 persons, a VAP of 14,328 persons, and a Black VAP of 14.0% (exclusive method) or 14.4% (inclusive method).

In Henrico, all trades between the Seventh and Third Districts involved moving population from the benchmark Seventh District to the adopted Third District. Four whole VTDs were assigned from the

benchmark Seventh District to the adopted Third District.

These Henrico population shifts from the benchmark Seventh District to the adopted Third District resulted in moving a total population of 14,550 persons, a VAP of 10,526 persons, and a Black VAP of 77.0% (exclusive method) or 77.8% (inclusive method).

In Richmond, seven whole VTDs and a part of one were moved from the benchmark Seventh District to the adopted Third District. One VTD was moved from the benchmark Third District to the adopted Seventh District.

The Richmond population shifts from the benchmark Seventh District to the adopted Third District resulted in moving a total population of 21,556 persons, a VAP of 17,217 persons, and a Black VAP of 56.6% (exclusive method) or 57.2% (inclusive method).

The single Richmond VTD moved from the benchmark Third District to the adopted Seventh District resulted in moving a total population of 1,788 persons, a VAP of 1,688 persons, and a Black VAP of 14.9% (exclusive method) or 15.1% (inclusive method).

Summary

The net effect of these trades among the Third District and surrounding Districts is reported in Table 6. Predominantly greater Black VAP was moved into the adopted Third District and predominantly lesser Black VAP was moved out of the benchmark Third District. The net result is that 63,976 persons were added to the adopted Third

District, 48,599 of whom were persons of voting age; 90.9% (exclusive method) or 92.0% (inclusive method) of this voting-age population is Black.

The overall racial composition of these trades are reflected in the trades made within localities as well. In Norfolk and Richmond, 45,161 persons were traded between the Third District and surrounding Districts, and in both localities substantially higher Black VAP formerly in surrounding benchmark Districts were swapped for substantially lower Black VAP in the benchmark Third District. The Hampton and Prince George trades between districts were essentially a wash, whereby slightly lower Black VAP in surrounding benchmark districts were swapped for slightly higher Black VAP in the benchmark Third District. Importantly, however, these trades created contiguous geography that enabled one-way trades between Districts, thereby adding substantially higher Black VAP to the adopted Third District in Petersburg and Henrico, and removing substantially lower Black VAP from the benchmark Third District in Newport News.

As a result of similar changes in *Moon v. Meadows*, the Court found the direction of increasing the Black VAP of the unconstitutional District a "...deliberate and integral part of Virginia's predominant intention to the principal goal of creating a safe black district." 952 F. Supp. at 1146. In my opinion, the same holds true for the adopted Third District. Virginia chose to further racially segregate localities from Norfolk to Richmond. Virginia did so through trades that involved removing predominantly White population from the Third District — even though the Third District needed to add population to reach population

balance — in exchange for predominantly Black population. This provides further evidence that race was the predominant factor in the creation of the adopted Third District.

7. Conclusions

In my opinion, race predominated in the construction of the adopted Third Congressional District. The bizarre shape of the adopted Third District serves the purpose of segregating localities along racial lines in order to create a majority Black district.

Furthermore, in my opinion changes made to the adopted Third District only intensified racial segregation among the Third and surrounding Districts. The Commonwealth's Section 5 submission to the Department of Justice confirms this. The Commonwealth describes how the changes to the benchmark Third Congressional District resulted in "...an increase in the total and voting-age African-American populations by 3.3 percent and 3.2 percent, respectively, and both total and voting-age populations are increased to over 55 percent." (These percentages are calculated using the exclusive method.)[5]

In my opinion, the fact that the African-American candidate of choice, Rep. Bobby Scott, successfully won reelection by landslide margins throughout the last decade indicates that not only was it unnecessary to increase the Black voting-age population of the Third District, the African-American community would have the ability to elect

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5 *See*: http://redistricting.dls.virginia.gov/2010/Data/Ref/DOJSubmission2012/Attachment_5_cong.pdf, at 2.

its candidate of choice with substantially less percentage of the voting-age population.

The Department of Justice found similarly that the Black VAP of the Third District can be safely reduced. In the wake of the *Moon v. Meadows* decision Virginia adopted a remedial Third District that reduced the Black VAP of the Third District from 61.6% to 50.5%.[6] The Department of Justice approved the remedial Third District under the non-retrogression standard.

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[6] See page 2 of a letter from then-Virginia Attorney General Mark Early to the Chief of the Department of Justice Voting Section with the heading "Submission under Section 5 of the Voting Rights Act: Ch. 1, 1998 Va. Acts Redistricting U.S. Congressional Seats." This letter was provided to me by Plaintiff's counsel as part of a FOIA request from the General Assembly's Division of Legislative Services.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on December 6, 2013, in Fairfax, Virginia.

/s/ Michael P. McDonald

Michael P. McDonald

Reply Report of Dr. Michael McDonald

Page v. State Board of Elections

Summary

Dr. Brunell's report is internally inconsistent, at one point concluding that "there is nothing in McDonald's report to support the claim that race was the predominant reason of changes made to the congressional lines or District 3" (Brunell, p. 9), and at other points conceding that my report includes some evidence that race predominated (Brunell, p. 1, 7). In sum, Dr. Brunell believes that it is impossible for any plaintiff to sustain a racial gerrymandering claim. Dr. Brunell merely lists an array of potential factors and throws up his hands, concluding that there is no way to discern whether race predominated. A long line of case law striking down districting maps as racial gerrymanders–along with the evidence presented in my initial report–suggests otherwise.

In fact, Dr. Brunell's analysis fails on multiple other grounds. For one, his report relies heavily on redistricting criteria that were adopted by a different body altogether and do not appear to have governed the drawing of the Adopted Third District. Moreover, his report fails to recognize that the Adopted District resembles the geographic and demographic features of the district struck down by the court in *Moon v. Meadows* in several important respects; while it is not identical, it is comparable, and should be struck down on the same grounds.

Dr. Brunell further recites a host of factors that may have been considered in the drawing of the Adopted Third District. He speculates that some population

shifts "may have been motivated to comply with the VRA [i.e., race] and it may have been motivated by politics" (Brunell, p. 5). But an analysis of highly Democratic VTDs placed within and without the Adopted Third District reveals that those located within the District have a much higher Black VAP percentage. Dr. Brunell further suggests that certain traditional criteria could have predominated, but all the evidence indicates that the General Assembly compromised the principles of preservation of cores, locality splits, compactness, and contiguity in favor of race.

Finally, Dr. Brunell hints that there may have been some justification for the racial motivation behind the Adopted Third District based on the Voting Rights Act, but he provides no expert analysis to prove as much and no answer to the basic evidence provided in my report that the minority population in the area would be able to elect its candidate of choice without such a high Black VAP.

Dr. Brunell will *never* find race the predominant factor

Dr. Brunell claims that "[t]here is nothing in McDonald's report to support the claim that race was the predominant reason for changes made to congressional lines statewide or to District Three" (Brunell, p. 9). I have applied a similar analysis to that used by the *Moon v. Meadows* court to arrive at my conclusions. The U.S. Supreme Court has applied similar analyses in other contexts to determine that race was the predominant factor in the adoption of a redistricting plan.

Dr. Brunell has previously opined that *no* evidence is sufficient to conclude that race was the predominant factor in the creation of a redistricting plan. In a recent case in South Carolina, Dr. Brunell testified that the task of proving race was a predominant factor "from the outset is almost impossible," and "there's really no good way of knowing this."[1] He further testified: "I don't think any of us in this room could ever determine what the predominant factor was, whether it was race or anything else."[2]

He reiterates this position in his report in this case, where he states there's a "reasonable chance" the predominant factor was something other than race but he "cannot say definitively" (Brunell, p. 7) why redistricting decisions were made. He holds this opinion despite that the U.S. Supreme Court and lower courts have repeatedly found race to be the predominant factor in the creation of a redistricting plan.

In short, Dr. Brunell's conclusion is preordained. In his own words, there is no evidence that he would ever agree with that shows race predominated in the creation of a redistricting plan. His expert report is therefore not credible, since he has not fairly weighed the evidence *in this case* to arrive at his opinion.

The Criteria Used for the Congressional Redistricting

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[1] *Backus v. The State of South Carolina*, No. 3:11-3120 (March 2, 2012), Trial Tr. at 29.

[2] *Backus v. The State of South Carolina*, No. 3:11-3120 (March 2, 2012), Trial Tr. at 41.

Dr. Brunell opines that "[t]he submission to the DOJ was particularly helpful insofar as it strikes me as the best evidence of the motivations for the enacted map" (Brunell, p. 1). He later notes that "[t]he Virginia Senate approved a set of 'Congressional District Criteria'" (Brunell, p. 2), and suggests that these criteria reflect the motivations of the General Assembly in drawing the Adopted Map.

Dr. Brunell is apparently unaware that a Democratic majority of the Virginia Senate adopted these criteria in 2011 when the chamber adopted a congressional redistricting plan introduced by Senator Locke. The Republican-controlled House of Delegates never formally adopted redistricting criteria and, in fact, adopted a different congressional redistricting plan. The two chambers were unable to reconcile their differences and no congressional plan was adopted in the 2011 legislative session.

The 2011 state legislative elections resulted in a tied Senate that gave Republicans a functional majority by virtue of Lt. Gov. Bill Bolling's tie-breaking vote. In the new 2012 legislative session, the now unified Republican-controlled legislature adopted a congressional redistricting plan identical to the plan adopted by the Republican-controlled House of Delegates in the previous legislative session.

There are three important points to this legislative history.

First, the Republican controlled House of Delegates never formally adopted any redistricting criteria that guided the creation of their congressional redistricting plan. As stated on p. 6 in Attachment 17, entitled "Legislative History of 2012 Virginia

Congressional Plan", of the Commonwealth's Section 5 submission, describing the events of March 25, 2011 in the 2011 Regular Session "[t]he House Committee held extensive discussions on the criteria for redrawing House of Delegates districts and *adjourned without taking up congressional redistricting criteria*" (emphasis added). As stated in a paragraph describing the events of January 11, 2012 on p. 8 of "Legislative History of 2012 Virginia Congressional Plan," when "...the legislature convened in its 2012 Regular Session...[t]he House Committee on Privileges and Elections met and Delegate Bell explained that HB 251 [the adopted plan] was the same as HB 5004 (2011 Special Session I), as it had passed the House in 2011."

Second, the criteria adopted by the Democratic-controlled Senate in 2011 were not binding on the Republican-controlled Senate in 2012, when the congressional plan was adopted. Between these two events state elections were held and a new legislative session began. Even if the legislature informally indicated they followed the Senate criteria, the legislature was not legally bound to follow them.

Third, the Third District, adopted by the Democratic-controlled Senate in 2011, drawn using the criteria Dr. Brunell opines are "the best evidence of the motivations for the enacted map" (Brunell, p. 1), is radically different than the Third District adopted by the Republican-controlled state legislature in 2012.

I depict the 2011 Democratic Senate's Third District in Figure 1 with a red boundary and overlay the district onto the Adopted Third District (pink). From

a visual inspection, the Democratic Senate's Third District is a visually compact district that contains the communities of Norfolk, Hampton, Newport News, and Portsmouth in their entirety.

The 2011 Democratic Senate's Third District meets equal population requirements. At no point does it cross water without a connecting bridge. The Democratic Senate's Third District splits fewer localities (3 v. 9) and Voting Tabulation Districts (8 v. 14) than the 2012 Adopted Third District.

It is my opinion that, regardless of any post-hoc justification provided either in the Section 5 submission or by Dr. Brunell, the Virginia Senate Congressional Redistricting Criteria were not operative in the creation of the 2012 Adopted Third District. If they were, as Dr. Brunell presumes, the Adopted Third District would look much different.

Figure 1. 2011 Democratic Senate's Third District (Red Boundary) Overlaid on Adopted Third District.

Comparison Between Adopted and Unconstitutional Third Districts

In my initial report, I describe the Adopted Third District's similarity to the Third District deemed an unconstitutional racial gerrymander in *Moon v. Meadows*. Dr. Brunell contends that these districts "bear little resemblance to each other" (Brunell, p. 2), but he offers nothing by way of data or demographics to undermine the analysis in my initial report.

I describe in the section of my report entitled "Defining the Black Voting-Age Population" (McDonald, pp. 12-13) that there are two methods of calculating minority VAP. An "exclusive method" includes only African-Americans who identify themselves as Black or White and Black, while the inclusive method includes African-Americans who identify themselves alone or in combination with all racial categories. The Adopted Third District has a Black VAP of 56.3% using the exclusive method and 57.2% using the inclusive method (McDonald, p. 14).

Dr. Brunell provides no opinion which method is the correct method to apply to the voting rights claims alleged by Plaintiffs. Since Dr. Brunell cites the 56.3% figure (Brunell, p. 3), presumably he prefers the exclusive method. It is my opinion, based on the relevant OMB and DOJ guidance, that the inclusive method's 57.2% is the correct measure for the voting rights claims alleged by Plaintiffs (McDonald, p. 13).

On p. 27 of my report, I note that the Black VAP of the Third District that the *Moon v. Meadows* Court found unconstitutional was 61.6%. This measure effectively uses the inclusive method since the Census Bureau did not allow individuals to identify

themselves as multiple races in the 1990 census (McDonald, p. 12). The 1998 Remedial Third District BVAP was 50.5% (McDonald, p. 27).

By either the inclusive or the exclusive method, the Adopted Third District has a Black VAP closer to the Unconstitutional Third District than the Remedial District. Using the exclusive method, there is a 5.8 percentage point difference in the Black VAP between the Adopted Third District and the Remedial Third District (56.3-50.5 = 5.8) and a 5.3 percentage point difference between the Adopted District and the Unconstitutional District (61.6-56.3 = 5.3). Using the inclusive method, there is a 6.7 percentage point difference in the Black VAP between the Adopted Third District and the Remedial Third District (57.2-50.5 = 6.7) and a 4.4 percentage point difference between the Adopted District and the Unconstitutional District (61.6-57.2 = 4.4).

Dr. Brunell opines that a "mere 56.3 percent African American VAP" can hardly constitute "packing," (Brunell, p. 3), apparently misunderstanding both Plaintiffs' claim and the court's decision in *Moon v. Meadows*. Plaintiffs have not brought a claim under the Voting Rights Act, so they need not prove "packing" that rises to the level of vote dilution.[3]

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[3] Dr. Brunell similarly makes an unprecedented legal claim regarding the minority voting-age population of a district that "[a]nything below 50 percent can be considered 'cracked'" (Brunell, p. 3). Although he does not define what he means by the term "cracked", presumably he is making an argument that the Third District must have greater than 50% Black VAP to meet Voting Rights Act requirements. This is not the usage of the term "cracked" as it is commonly understood in the context of voting rights. "Cracking" refers to the strategy of assigning a

Rather, Plaintiffs allege that the Adopted Third District is a racial gerrymander, i.e. that race was the predominant factor in drawing the District, as demonstrated by the decision to place a significant number of African-American voters within the District. Given that the Black VAP of the Adopted Third District is comparable to that of the *Moon v. Meadows* Unconstitutional District, it is hardly "absurd" (Brunell, p. 3) for the Court to carefully consider the Adopted Third District to be an unconstitutional racial gerrymander by virtue of the packing of African-Americans within its boundaries.

Indeed, Dr. Brunell notes only three differences between the Adopted District and the *Moon v. Meadows* Unconstitutional District, namely the exclusion of three counties in the Unconstitutional District. I concur that these differences exist, as I list these differences in my report (McDonald, p. 6).

In my analysis, I believe that the Adopted and Unconstitutional Third Districts are "strikingly similar" (McDonald, p. 6), not that they are exact duplicates, particularly in the way that they both encompass communities that bear little in common, stretching from Norfolk to Richmond, and connected in multiple locations only by the James River with no bridge crossing. As in the Unconstitutional Third District, a constituent would have to travel substantial distances outside the Adopted Third

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minority community to two or more districts so that its voting power is diluted among multiple districts. The Department of Justice routinely approved districts under Section 5 preclearance review with minority voting-age populations less than fifty percent.

District, crossing other districts, to travel by land from all points within the District, be it from Richmond, Surry, or Norfolk. And, like the Unconstitutional Third District, the Black VAP is substantial, indicating that race was the driving factor.

Constitutionality of the 1998 Remedial Third District or the 2001 Benchmark District

Dr. Brunell faults me for not mentioning the "1998 or 2001 versions of District 3 at all" (Brunell, p. 2). I mentions both, using the terms "Remedial" to refer to the 1998 District and "Benchmark" to refer to the 2001 adopted district.

I do not compare the geography of the Adopted Third to the Remedial or Benchmark Third Districts because these districts are also constitutionally suspect. In legislative hearings concerning the Remedial Third District Paul Hurd, the attorney representing the *Moon v. Meadows* Plaintiffs, objected to the Remedial plan, arguing in a letter (as described by Delegate Kirkland Cox) to the General Assembly that the Remedial Third District was unconstitutional.[4] Other prominent Virginians, such as then-state Senator and Former Lt. Gov. Bill Bolling expressed similar concerns about the Remedial Third District, stating that "...in my judgment it still uses race as the predominant

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[4] In Re Proposed Redistricting for the Third Congressional District of Virginia, Committee on Privileges and Elections, January 21, 1998, p. 19.

factor."[5] Delegate Wardrup stated that, "I simply do not think [the Remedial District] is going to pass muster."[6]

There is no record of a continued legal challenge to the Remedial or Benchmark Third Districts, nor did the *Moon v. Meadows* court ever approve the Remedial District. Furthermore, the plaintiffs in *Page v. State Board of Elections* make no claims against the Remedial or Benchmark Third Districts. Plaintiffs here allege instead that race was the predominant factor in the creation of the Adopted Third District. There is no reason to believe race was not also the predominant factor in the creation of the Remedial and Benchmark Third Districts. Regardless, we know that race was the predominant factor in the creation of the Unconstitutional Third District, making it a more appropriate reference point.

Race or Politics?

Dr. Brunell asserts without any supporting evidence that "[i]n any journalistic coverage of redistricting the reader gets the feeling that the only reason maps get drawn they (sic) way that they do is because of politics" (Brunell, pp. 4-5). Perhaps Dr. Brunell selectively reads accounts of redistricting, since even in his home state of Texas, a federal court recently

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[5] In Re Proposed Redistricting for the Third Congressional District of Virginia, Committee on Privileges and Elections, January 15, 1998, p. 24.

[6] (Joint Committee House and Senate Hearings on Privileges and Elections, January 28, 1998, p. 82).

struck down a congressional map based on intentional discrimination toward minorities.

Dr. Brunell uses this statement to put forward an alternative theory that politics predominated over race. Dr. Brunell implies that perhaps it is simply African-American voters' high support for Democratic candidates that gives Republicans a reason to pack African Americans into the Third District.

Dr. Brunell offers only two examples of redistricting decisions he suggests may have been politically motivated. First, with respect to the move of Petersburg from the Benchmark Fourth District to the Adopted Third, Dr. Brunell avers that this move "may have been motivated to comply with the VRA and it may have been motivated by politics" (Brunell, p. 5). Dr. Brunell makes clear that he is himself speculating as to the motivation, and, tellingly, even he admits that race may have predominated in this move. Indeed, throughout his report he suggests that an attempt at VRA compliance drove the creation of District 3, in accord with Plaintiffs' claim that race was the predominant purpose.

In the other of his two examples, a move of "heavily Republican" (Brunell, p. 5) New Kent from the Benchmark Third District to the Adopted Seventh District, Dr. Brunell argues that incumbency protection may have motivated this move. But Dr. Brunell provides no evidence as to how heavily Republican New Kent is; he just asserts that it is so, and he presents no evidence that such a move would improve the incumbents' reelection chances.

According to the Virginia State Board of Elections,[7] Rep. Eric Cantor, the incumbent in the Seventh District, won reelection in 2010 by a 25.10 percentage point margin, and Rep. Bobby Scott won reelection in the Third District by 42.83 percentage point margin. These margins are well above the ten percentage point margin that political scientists and election observers regard as "competitive." Moving New Kent, even if it was "heavily Republican," from the Benchmark Third District to the Adopted Seventh District had a negligible effect on the future reelection chances of the incumbents of these districts.

Redistricting inherently poses choices of which geography and population to assign to a district. To test Dr. Brunell's theory that politics predominated over race, I examine the racial composition of highly Democratic VTDs in the localities that comprise or are adjacent to the Adopted Third District.[8] If the redistricting decisions were driven primarily by politics as Dr. Brunell argues, I would expect to see no racial patterns to the VTDs assigned to the Third and surrounding Districts.

To proceed with my analysis, I develop a Democratic performance measure consistent with Dr. Brunell, who "...averaged the Democratic share of the vote in five recent statewide elections (2009 Gubernatorial, Attorney General, and Lt. Governor elections, and the 2008 Presidential and Senatorial elections)"

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[7] https://www.voterinfo.sbe.virginia.gov/election/DATA/2010/EB24720D-F5C6-4880-8DC5-12AE4D0C3772/official/6_s.shtml.

[8] I did not have data readily available for Charles City, Surry, Colonial Heights, or Southampton.

(Brunell, p. 5). Although Dr. Brunell does not adequately describe the construction of his measure, I assume that he follows the widely-accepted political science convention of calculating the "two-party vote", or the votes for the major candidates only, excluding minor party candidates.

I examine the Black VAP of all VTDs that have a Democratic performance greater than 55%, which is above the accepted level political scientists consider to be competitive, and thus are considered to be heavily Democratic.[9]

Of the 189 VTDs assigned to the Adopted Third District with a Democratic performance above 55%, the average Black VAP is 59.5%.

Of the 116 VTDs assigned to the surrounding Adopted Districts with a Democratic performance above 55%, the average Black VAP is 43.5%.

The difference in the average Black VAP in the heavily Democratic precincts assigned to the Adopted Third District compared to the surrounding Districts is 16.0 percentage points.

I conclude from this analysis that race trumped politics. In instances where the Commonwealth of Virginia had an opportunity to assign highly performing Democratic VTDs to the Third District, those with higher Black VAP were assigned to the Third District and those with lower Black VAP were

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[9] These data were provided to me by Plaintiff's counsel, and it is my understanding that they were compiled by the National Committee for an Effective Congress (NCEC). NCEC's calculates 2010 Black voting-age population using the exclusive method, but this should not greatly affect my conclusions.

assigned to the surrounding districts. Democratic districts assigned to the Third District are therefore disproportionately Black. In other words, the General Assembly was not simply assigning Democrats to the Third District; they were assigning Black Democrats to the District.

Traditional Redistricting Principles

Dr. Brunell discusses four traditional redistricting principles in sections entitled "Preservation of cores" (Brunell, p. 6), "VTD splits" (Brunell, p. 7), "Compactness" (Brunell, p. 8), and "Contiguity" (Brunell, p. 8), as they relate to the non-operative 2011 Democratic Senate criteria. I address the claims in these sections and related sections here.

Preservation of Cores

In Table 3 of his report (Brunell, p. 6), Dr. Brunell restates information found in the Commonwealth's Section 5 submission regarding the preservation of district cores, or the continuity of population in the Benchmark and Adopted districts.

Dr. Brunell provides no statement as to the relevance of his Table 3 statistics in forming his opinions. However, in the very next section entitled "Racial Changes to District 3" (Brunell p. 7), Dr. Brunell provides a laundry list of reasons why district cores will be violated, including wanting "their grandbaby's preschool in their district" (Brunell, p. 7). Dr. Brunell provides no evidence that a boundary line was ever changed for the reasons he provides.

Dr. Brunell appears to opine that all other criteria he presumes were used in the 2012 congressional redistricting trumped preservation of cores since he provides no opinion in support of preservation of

cores, but provides numerous examples of why district cores may be violated. He thereby cherry picks evidence that supports his opinion and disregards evidence *found in his own report* that weakens it.

Most importantly, if preservation of district cores was a value the legislature held in high regard, the legislature would not have removed population from the under-populated Benchmark Third District, as that only made the redistricting task more complicated. Removal of population is only *to the detriment* of the preservation of cores. As demonstrated in my initial report, the racial composition of the populations strategically removed and added to the Third District provides strong evidence that race predominated over any purported desire to preserve the core of the District.

VTD or Locality Splits

Dr. Brunell agrees that "District 3 splits more VTDs than any other district in the state" (Brunell, p. 7), a factor the *Moon v. Meadows* court weighed in determining race was the predominant factor in the creation of the Unconstitutional District. He also admits "[t]he same is true for split localities" (Brunell, p. 7), another factor the court weighed in its decision.

Dr. Brunell discounts these splits on the theory that the numbers of locality and VTD splits were reduced from the benchmark to the adopted plans. As stated above, the constitutionality of the Benchmark district was never upheld by a court. Nor does the constitutionality of the Adopted Third District hinge on how it compares to the Benchmark District. Even

if it improves to some degree upon aspects of the Benchmark District, the fact remains that, like the *Moon v. Meadows* Unconstitutional District, the Adopted Third District has more splits than any other district.

Compactness

Dr. Brunell agrees that the Adopted Third District is the least compact on multiple compactness measures (Brunell, p. 8).

He attempts to minimize this fact, however, by noting that the Adopted Third District's compactness scores are only slightly worse than those of other districts. But Dr. Brunell glosses over the significance of the variation in compactness scores. For instance, for the Reock compactness measure, the adopted districts range in value between .37 and .19, with the Adopted Third District the least compact. The next least compact district is the Adopted Ninth District with a value of .20, which makes the Adopted Third District 5.6% less compact than the Adopted Ninth District. Similarly, for the Polsby-Popper compactness measure, the adopted districts range in value between .26 and .08, with the Adopted Third District the least compact. The next least compact district is the Adopted Eleventh District with a value of .09, which makes the Adopted Third District 5.6% less compact than the Adopted Ninth District.

By any measure, qualitative or quantitative, the Adopted Third District is not compact. The fact that it is the least compact of all of Virginia's congressional districts only drives home the point.

Contiguity

Dr. Brunell notes that the non-operative Senate criteria allowed contiguity by water. Contiguity by water must occur when situations force it, such as connecting an island to the shore. However, what is questionable is when available land and the people who live on it are bypassed using water. The 2011 Democratic Senate's District Three was contiguous over water by bridge connections, so the intent of the Senate appears to be to minimize violations of contiguity that may arise when a district crosses water with no connecting bridge.

Water contiguity is a characteristic that the *Moon v. Meadows* court factored into their decision, citing on p. 1144 how the unconstitutional district used "...only the open water of the Chesapeake Bay and the James River to connect the disparate and non-contiguous portions..." of the district. The court further lists on p. 1147 of its decision "barren stretches of river" among its "dubious connectors" with the intent of this contiguity by water "...so that a concentration of non-blacks is avoided." The Commonwealth of Virginia uses water in the same way to have the Adopted Third District bypass White populations.

The use of water to connect the disparate parts of the Third District is also a reason why the Adopted Third District splits some VTDs and localities, as I concur with Dr. Brunell that some splits "only involves water in the James River" (Brunell, p. 7). Keeping VTDs that border on the James River whole would have added predominantly more White voting-age population to the Adopted Third District.

Dr. Brunell's assertion that I am "mistaken" (Brunell, p. 8) that water contiguity without a bridge violates contiguity fails to recognize the *Moon v. Meadows* court found water contiguity without a connecting bridge to be a factor weighed in its determination that race predominated in the creation of the Unconstitutional Third District.

Was There a Voting Rights Act Rationale to Increase the Black VAP of the Third District?

Dr. Brunell asserts that "race had to play a role because of the Voting Rights Act" (Brunell, p. 4), and opines that "[s]lightly increasing the minority population of the [Third] [D]istrict is not unconstitutional but sensible" (Brunell, p. 3). But Dr. Brunell's subjective opinion of the "sensibility" of the legislature's decision, unsupported by any facts or data regarding what is required under the Voting Rights Act, is hardly sufficient to carry Defendants' burden to prove that the Voting Rights Act required a Black VAP of 56.3% in the Adopted Third District.

Dr. Brunell notes that "Section Five, which was still in effect when this map was passed, required Virginia to get the new map pre-cleared by the Department of Justice" (Brunell, p. 4). But he offers no analysis of what Section 5 required with respect to the Adopted Third District. He notes only that the DOJ precleared the Legislature's map. He neglects to mention, however, that the Remedial 1998 Third District was also precleared under Section 5 with a Black VAP of 50.5%. Certainly, Dr. Brunell cannot offer any Section 5 basis for *increasing* the Black VAP of the District nearly three percentage points. Under Dr. Brunell's theory, it would be "sensible" for

the Commonwealth of Virginia in each redistricting to slightly increase the Black VAP population of the Third District until it exceeded and continued to exceed the level that the *Moon v. Meadows* Court found to be unconstitutional.

Dr. Brunell further claims that "Section Two of the Voting Rights Act requires the creation of majority-minority districts, like District 3" (Brunell, p. 4). But he performs no Section 2 analysis to demonstrate that this provision of the Voting Rights Act compelled the creation of the Adopted Third District. Specifically, he performs no racial bloc voting analysis to determine the presence and extent of racially polarized voting, a critical factor in any Section 2 analysis. This statistical technique evaluates voting patterns among racial groups to determine levels of turnout and support from the White and minority communities that are needed to elect a minority candidate of choice.

Dr. Brunell is familiar with racial bloc voting analyses, having performed them as an expert witness in other litigation. Yet, he does not provide one in his report to support his opinions that "slightly raising" (Brunell, p. 3) the Black voting-age population in the Adopted Third District was "sensible" to elect the African-American candidate of choice. It is unclear, then, what the basis is for any of his opinions with regards to Section Two or Section Five as they apply to the Third District.

Similarly, the Commonwealth of Virginia did not perform a racial bloc voting analysis as part of its Section 5 submission to the Department of Justice. If the Voting Rights Act did compel the creation of the

Adopted Third District, the Commonwealth of Virginia should have conducted a racial bloc voting analysis to explain why race was taken into account to raise the Black VAP of the Third District in order to elect the African-American candidate of choice.

In the section of my report entitled "Historical Performance of Candidates to the Third District" (McDonald, p. 11), I describe how the African-American incumbent Rep. Bobby Scott has been reelected by overwhelming majorities with an average vote share of 85% from 2002 to 2012. Dr. Brunell claims that the elections of Rep. Scott are "not useful" (Brunell, p. 4) because he is an incumbent. Yet, courts hold that the elections of most probative value are those endogenous to the district in question where are presented with the choice between candidates of different races, such as a Black candidate running against a White candidate. Since the Third District has a Black VAP substantially less than 85%, simple logic reveals that there must be substantial White crossover voting for Rep. Scott such that the Third District's Black VAP can be safely lowered below the Adopted Third District's 56.3% (exclusive method) or 57.2% (inclusive method) and continue to elect the African-American candidate of choice.[10]

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[10] Dr. Brunell also provides an incomplete list of factors that are analyzed in a racial block voting analysis. He describes the differential rates of individuals "...registered to vote" and their "turnout" (Brunell, p. 3). He omits the levels of White crossover voting for the minority candidate of choice. The minority VAP may be dramatically less than fifty percent in a district capable of electing a minority candidate of choice, if the White population has a high level of support for the minority candidate

Dr. Brunell's summary analysis of the Voting Rights issue fails to recognize that it is Defendants' burden to prove that the Voting Rights Act compelled the significantly high Black VAP drawn into the Adopted Third District. Dr. Brunell's admission that the Voting Rights Act "played a major role in defining" (Brunell, p. 4) the Adopted Third District, along with his failure to conduct any statistical analysis whatsoever to justify that use of race, only strengthens the conclusions of my initial report: race was the predominant factor in the creation of the Adopted Third District and it was likely not required to be drawn with such a high Black VAP.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on March 24, 2014 in Fairfax, Virginia.

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Michael P. McDonald

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of choice. I do not know why Dr. Brunell omits this important factor to a racial bloc voting analysis, although the presence of substantial crossover voting would undermine his statements that increasing the Black VAP of the Third District was "sensible" under Section Five and legally required under Section Two.

ANALYSIS BY DR. MICHAEL MCDONALD OF PLAINTIFFS' PROPOSED ALTERNATIVE CONGRESSIONAL PLAN

Page v. State Board of Elections

Plaintiffs in *Page v. State Board of Elections* have produced an alternative redistricting plan to address constitutional deficiencies in the Third Congressional District adopted by the Commonwealth of Virginia. Plaintiffs have produced an Alternative Third Congressional District narrowly tailored to maintain a majority-minority district and to minimize changes to the Adopted Map. The alternative plan makes changes only to two Adopted Congressional Districts, the Second and the Third. These changes have the effect of producing a Third District that, in comparison to the Adopted Third District, (1) is narrowly tailored to create a district with a Black Voting-Age Population of 50.2% (exclusive method) or 51.0% (inclusive method), (2) better respects existing locality and VTD boundaries, (3) is more compact, and (4) does not cross water without a connector with the effect of bypassing White communities. As a by-product of these changes, the Adopted Second District is also improved in terms of respecting locality boundaries, compactness, and crossing water without a connector.

Description of Plaintiffs' Alternative Third District

Plaintiffs' Alternative Districts are different from the Adopted Districts only in the shared boundary between the Adopted Second and Third Districts. Figure 1 demonstrates by overlaying the Alternative Third District on the Adopted Districts. The Adopted

Districts use the same coloring scheme as in my original report (McDonald pp. 2-5), with the Adopted Second District shaded green and the Adopted Third shaded pink. Plaintiffs' Alternative Districts are outlined in dark green.

Figure 2 provides a detail of the difference between Plaintiffs' Alternative Districts and the Adopted Districts in the only affected localities of Hampton, Newport News, Norfolk, and Portsmouth. Since it may not be apparent, Figure 3 provides another closer view of a small split that occurs in Portsmouth to balance the populations between the Alternative Second and Third Districts.

There are two primary differences between the Alternative and Adopted Districts. First, VTDs located in Hampton and Newport News formerly in the Benchmark First District are assigned to the Alternative Third District instead of the Second District, thereby minimizing splits of these localities, their VTDs, improving the compactness of the district, and rectifying the use of the James River to by-pass non-Black areas of Hampton and Newport News. Second, the locality of Norfolk is entirely assigned to the Alternative Second District, thereby eliminating splits of this locality, improving the compactness of the district, and eliminating the use of water without connecting bridges to keep the Second District contiguous. A small slice of Portsmouth is split to balance the Alternative Second and Third Districts' total populations.

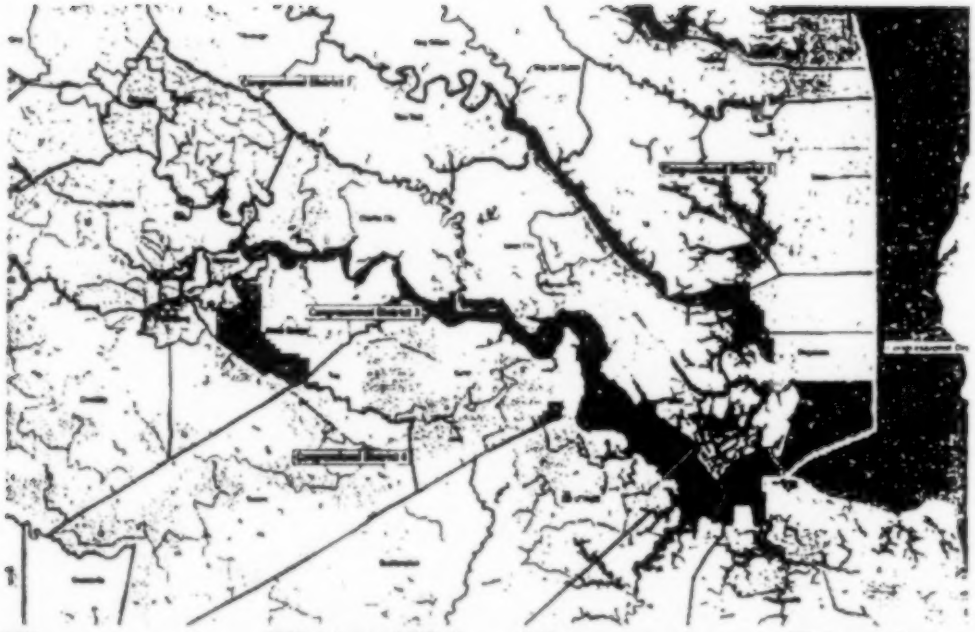

Figure 1. Plaintiffs' Alternative Districts Overlaid on Adopted Districts

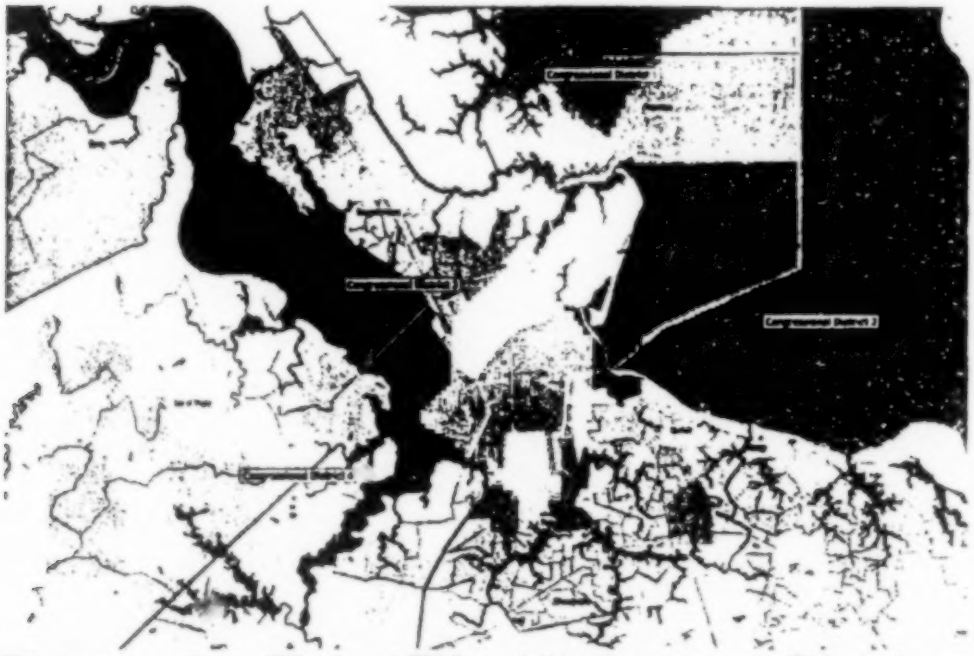

Figure 2. Plaintiffs' Alternative Districts Overlaid on Adopted Districts: Hampton, Newport News, Norfolk, and Portsmouth Detail

Figure 3. Plaintiffs' Alternative Districts Overlaid on Adopted Districts: Portsmouth Detail

Locality and VTD Splits

The Alternative Districts more closely adhere to locality boundaries than the Adopted Districts. While the Adopted Second and Third Districts split between them the localities of Hampton, Newport News, and Norfolk, the Alternative Districts reunite these localities. Hampton and Newport News geography formerly in the Benchmark First District that was assigned to the Adopted Second District is now assigned to the Alternative Third District. Norfolk geography assigned to the Adopted Third district is assigned to the Alternative Second District.

Table 1 reports the number of times districts in the Adopted and Alternative Plans split localities. Districts in Plaintiffs' Alternative Plan split a total of 34 localities, compared with the Adopted Plan's 37 locality splits. The Alternative District Two splits

two fewer localities than the Adopted District Two. The Alternative District Three splits one fewer locality than the Adopted District Three.

Table 2 reports the number of times districts in the Adopted and Alternative Plans split VTDs. Districts in Plaintiffs' Alternative Plan split a total of 38 VTDs, 6 fewer than the 44 in the adopted plan. The Alternative Third District splits a net of 3 fewer VTDs; there are 4 fewer VTD splits in Newport News, 1 fewer split in Hampton, and 2 more splits in Portsmouth. The Alternative Second District has a net of 2 fewer VTD splits; there are 3 fewer VTD splits in Newport News, 1 fewer split in Hampton, and 2 more splits in Portsmouth.

	Adopted Plan		**Alternative Plan**	
District	**Number of Locality Splits by a District**	**Number of Locality Splits Involving CD3**	**Number of Locality Splits by a District**	**Number of Locality Splits Involving CD3**
1	5	2	5	2
2	3	3	1	1
3	9	9	8	8
4	4	3	4	3
5	3		3	
6	2		2	
7	4	2	4	2
8	1		1	
9	2		2	
10	2		2	
11	2		2	
Total	**37**	**19**	**34**	**16**

Table 1. Comparison of Locality Splits in Adopted Plan and Alternative Plan

	Adopted Plan		Alternative Plan	
District	Number of VTD Splits by a District	Number of Locality Splits Involving CD3	Number of VTD Splits by a District	Number of Locality Splits Involving CD3
1	4	1	4	1
2	5	5	2	2
3	14	14	11	11
4	7	7	7	7
5	3		3	
6	1		1	
7	2	1	2	1
8	2		2	
9	1		1	
10	2		2	
11	3		3	
Total	**44**	**28**	**38**	**22**

Table 2. Comparison of VTD Splits in Adopted Plan and Alternative Plan

Plaintiffs' Alternative Plan has two locality splits among the localities of Hampton, Newport News, Norfolk, and Hampton: (1) A split of Newport News between the Adopted First and Third Districts is preserved in Plaintiffs' Alternative Plan in order to prevent any change to the Adopted First District, and (2) A split of Portsmouth shown in Figure 3 is created to balance the population of the Alternative and Second Districts, so that both Alternative districts have the exact equal total population of 727,366 persons.

Table 3 reports that the split of Portsmouth affects 1,016 total persons, or 0.14% of the total population of these districts.[1] This contrasts with the Adopted Plan, in which a total of 241,096 persons, or 33.1% of the total population, are affected by the splits of these districts.

	Adopted Plan		**Alternative Plan**	
	3rd District	**2nd District**	**3rd District**	**2nd District**
Hampton	92,867	44,569	137,436	0
Newport News	85,453	88,176	173,629	0
Norfolk	131,729	111,074	0	242,803
Portsmouth	95,535	0	94,519	1,016
Net (Sum of smaller population split in a locality)	241,096		1,016	

Table 3. Total Population Split Between Districts Two and Three in Adopted and Alternative Plans.

Not only do these Alternative Districts better conform to traditional redistricting principles, they

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[1] It is my opinion that since the affected population is sufficiently small, if the court determines there is a rational objective of preserving the integrity of political subdivision lines the entirety of Portsmouth can be assigned to Alternative District Three. For example, *Abrams v. Johnson* 521 U.S. 74 (1997), the U.S. Supreme Court upheld a Georgia congressional redistricting plan drawn by a court with an *overall* deviation of 0.35 percent; a modified Alternative plan here would have an overall deviation between the largest and smallest district of 0.28 percent. This small change meets the rational goals of reducing election administration costs and reducing voter confusion for the affected Portsmouth population.

also conform more closely to the public's preferences expressed to the General Assembly. The Commonwealth of Virginia included in Attachment 15 of their Section 5 submission regarding the Adopted congressional districts a transcript of a redistricting forum held in Norfolk, Virginia on September 22, 2010. At the forum members of the public repeatedly appealed to representatives of the General Assembly to respect the region's localities, and no speaker expressed a preference for spitting localities. For example:

- "[T]o remain true to the values of a representative democracy, the redistricting plan should be drawn in [a] manner in which elected representation is determined on the basis of shared common interests of the localities and their citizens." – Paul Fraim, Mayor, City of Norfolk, Public Hearing of the Redistricting Subcommittee of the Privileges and Elections Committee of the Virginia House of Delegates, Norfolk, VA, Sept. 22, 2010 (hereafter "Meeting Transcript"), p. 14.
- "[I]t would not serve the city of Norfolk of the folks in Ocean View area and the vibrant community that we have very well if you chop it up..." – Pam Brown, Chair, Republican Party of Norfolk, Meeting Transcript at p. 21.
- "[P]lease do it [redistricting] in a way that was intended over 200 years ago, where it was done by areas..." – Richard Fisher, private citizen, Meeting Transcript at pp. 22-23.
- "We know that the mathematics of the process may require some sharing of representation, but this should be minimized. Certainly the 4th

Congressional District must contain all of Chesapeake." – Pete Burkhimer, Chair, Chesapeake City Committee of the Republican Party of Virginia, Meeting Transcript at p. 25.

- "Chesapeake wants to be together, but so does everyone else. Norfolk wants to be. So does everyone else. So please get that at the top of a priority..." Eileen Huey, private citizen, Meeting Transcript at p. 31.
- "Don't split cities and towns. Real simple. You've heard it. You've heard it echoed over and over again." – Thorn Ayres, Director of Operations for the Hampton Roads Tea Party, Meeting Transcript at p. 33.
- "Hampton, to my knowledge, is the only jurisdiction in the Commonwealth of Virginia that is split into three congressional districts, and it makes it real difficult to find out which voter goes where." – Carl Anderson, Tea Party Patriot and Chairman of the Republican Party of Hampton, Meeting Transcript at p. 34.
- "We'd like to keep the integrity of each of the cities intact when redistricting. It's difficult for the city of Norfolk – we're divided by both the 2nd and 3rd." – Alexander Palmer, Second Vice-Chair Norfolk Democratic Committee, Meeting Transcript at p. 45.

Compactness

In Table 4, I report the compactness of the Adopted and Alternative congressional districts. I report three commonly used compactness measures called the Reock Test, Polsby-Popper Test, and the Schwartzberg Test, the mechanics of which are described in my initial report (McDonald, p. 7).

Plaintiffs' Alternative District Three is more compact than Adopted District Three on all three compactness measures.

- By the Reock measure, where *larger* values indicate a more compact district, Adopted District Three has a score of 0.19 and Alternative District Three has a score of 0.22. Furthermore, whereas Adopted District Three ranks as the least compact district by the Reock measure, Alternative District Three ranks as the second least compact district.
- By the Polsby-Popper measure, where *larger* values indicate a more compact district, Adopted District Three has a score of 0.08 and Alternative District Three has a score of 0.11. Furthermore, whereas Adopted District Three ranks as the least compact district by the Polsby-Popper measure, Alternative District Three ranks as the second least compact district.
- By the Schwartzberg measure, where *smaller* values indicate a more compact district, Adopted District Three has a score of 3.07 and Alternative District Three has a score of 2.04. Furthermore, whereas Adopted District Three ranks as the least compact district by the Schwartzberg measure, Alternative District Three ranks as the third least compact district (tied with District Four).

	Adopted Plan			Alternative Plan		
District	Reock	Polsby-Popper	Schwartzberg	Reock	Polsby-Popper	Schwartzberg
1	0.28	0.18	2.09	0.28	0.18	2.09

	Adopted Plan			Alternative Plan		
District	Reock	Polsby-Popper	Schwartzberg	Reock	Polsby-Popper	Schwartzberg
2	0.27	0.20	2.09	0.26	0.33	1.65
3	0.19	0.08	3.07	0.22	0.11	2.04
4	0.32	0.20	2.04	0.32	0.20	2.04
5	0.30	0.15	2.30	0.30	0.15	2.30
6	0.26	0.16	2.17	0.26	0.16	2.17
7	0.30	0.13	2.34	0.30	0.13	2.34
8	0.37	0.26	1.76	0.37	0.26	1.76
9	0.20	0.18	2.13	0.20	0.18	2.13
10	0.29	0.12	2.60	0.29	0.12	2.60
11	0.23	0.09	3.06	0.23	0.09	3.06

Table 4. Compactness of Adopted and Alternative Congressional Districts

Contiguity

As noted in my Reply to Defendants' Expert, "... [T]he *Moon v. Meadows* court found water contiguity without a connecting bridge to be a factor weighed in its determination that race predominated in the creation of the Unconstitutional Third District." (McDonald, p. 10).

Plaintiffs' Alternative District is contiguous across the James River without a connection in two places, (1) between the localities of Portsmouth and Hampton and (2) between Newport News and Surry. These uses of water contiguity have the effect of respecting locality boundaries. By contrast, the Adopted Districts, as I describe in my initial expert report (McDonald p. 8), use water contiguity without a connection in multiple locations, which in the cases of Hampton and Newport News (McDonald, p. 17) and Norfolk (McDonald, p. 21) has the effect of bypassing White communities.

Black Voting-Age Population

The Benchmark Third District had a Black VAP of 53.1% (inclusive method) or 53.9% (exclusive method). The Adopted Third District increased the number and percentage of Black voters, with a Black VAP of 56.3% (exclusive) or 57.2% (inclusive). Plaintiffs' Alternative Third District has a Black Voting-Age Population of 50.2% (exclusive) or 51.0% (inclusive). This figure is not dissimilar to the Remedial District drawn in response to *Moon v Meadows*, which had a Black VAP of 50.5%.

In my initial expert report I describe how trades among the Benchmark Third District and surrounding districts consistently had the effect of increasing the Black VAP of the Adopted Third District (McDonald, pp. 13-15). This analysis is restated in Table 4.

Benchmark to Adopted District	Total Pop	VAP	Black VAP (exclusive method)	Black VAP (inclusive method)	% Black VAP (exclusive method)	% Black VAP (inclusive method)
1 to 3	23,288	17,805	7,736	7,933	43.4%	44.6%
3 to 1	7,351	5,106	2,224	2,286	43.6%	44.8%
2 to 3	27,917	20,543	7,548	7,785	36.7%	37.9%
3 to 2	25,501	20,049	3,661	3,774	18.3%	18.8%
4 to 3	35,447	27,835	20,917	21,089	75.1%	75.8%
3 to 4	5,713	4,176	1,729	1,757	41.4%	42.1%
7 to 3	36,106	27,743	17,853	18,035	64.4%	65.0%
3 to 7	20,217	15,996	2,255	2,314	14.1%	14.5%
Net Change to Third District	63,976	48,599	44,185	44,711	90.9%	92.0%

Table 4. Population Movement Between Benchmark and Adopted Congressional Districts (Table 6 in McDonald, p. 15)

In Table 5, I produce a similar analysis. I have shaded rows for trades of areas of the Alternative Third District that are identical to the Adopted Third District.

Table 4 shows that the Black VAP of the net population moved into the Adopted Third District is 90.9% (exclusive) or 92.0% (inclusive). In contrast, the Black VAP of the net population moved into the Alternative Third District is 22.1% (exclusive) or 22.8% (inclusive). This is expected, as Plaintiffs' Alternative District lowers the Black VAP compared to the Benchmark district by 2.2 percentage points (either method) while the Adopted district raises it by 3.2 (exclusive) or 3.3 (exclusive) percentage points.

The trades of population between the Benchmark Third District and the surrounding Alternative Districts no longer consistently point in the direction of swapping lower Black VAP formerly in the Benchmark Third District with higher Black VAP from the surrounding Benchmark districts. Trades between the First and Third Districts and Second and Third Districts swap higher Black VAP formerly in the Benchmark Third District with lower Black VAP from the surrounding Benchmark districts.

Benchmark to Alternative District	Total Pop	VAP	Black VAP (exclusive method)	Black VAP (inclusive method)	% Black VAP (exclusive method)	% Black VAP (inclusive method)
1 to 3	106,886	83,523	24,714	25,349	29.6%	30.3%
3 to 1	7,351	5,106	2,224	2,286	43.6%	44.8%
2 to 3	45,798	35,556	9,599	9,866	27.0%	27.7%
3 to 2	126,980	97,432	55,382	56,161	56.8%	57.6%
4 to 3	35,447	27,835	20,917	21,089	75.1%	75.8%
3 to 4	5,713	4,176	1,729	1,757	41.4%	42.1%
7 to 3	36,106	27,743	17,853	18,035	64.4%	65.0%
3 to 7	20,217	15,996	2,255	2,314	14.1%	14.5%
Net Change to Third District	63,976	51,947	11,493	11,821	22.1%	22.8%

Table 5. Population Movement Between Benchmark and Alternative Congressional Districts

Narrowly Tailored Use of Race

The Alternative Third District does not cure all the problems identified in the Adopted Third District, but, in my opinion, the use of race is narrowly tailored to maintain a majority-minority district without unnecessarily compromising traditional redistricting criteria. Additionally, Plaintiffs' attempt to minimize the changes to the Adopted Map contributes in large part to the fact that the Alternative Map does not cure all of the issues identified in my first report.

While the Alternative Third District continues to split more localities than any other district, it splits fewer localities than the Adopted Third District. Similarly, while it continues to split more VTDs than any other district, it splits fewer VTDs than the Adopted Third District. It is not compact, but it is no longer the least compact district. It crosses the James River without a connection, but the use of water contiguity no longer has the effect of bypassing White populations. It continues to be a majority Black Voting-Age Population district.

While in my opinion race continues to be a factor in the creation of the Alternative Third District, the district is narrowly tailored to produce the goal of a majority-minority district without unnecessarily compromising traditional redistricting criteria. The Alternative Third District has a Black VAP of 50.2% (exclusive) or 51.0% (inclusive) method. As I have noted previously in my expert report (McDonald, p. 27) and my Reply to Defendants' Expert (McDonald p. 5), the Remedial Third District adopted in response to *Moon v. Meadows* had a Black VAP of

50.5%. By any metric, the Alternative Third District hews much more closely to the Black VAP of the Remedial Third District than the Adopted Third District does.

Conclusion

Plaintiffs' Alternative Third District narrowly tailors the district to maintain a majority Black VAP Alternative Third District by only affecting the boundaries of the Adopted Second and Third Districts, thereby minimizing disruption to the impending 2014 congressional elections. It does so by minimizing locality splits in Hampton, Newport News, Norfolk and Portsmouth, which is also the expressed wishes of the citizens of these localities.

I declare that under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on February 21, 2014 in Fairfax, Virginia.

/s/ Michael P. McDonald

Michael P. McDonald

Dr. Michael P. McDonald
Reply Report to Mr. Morgan

Overview

Defendants retained Dr. Brunell as an expert to address the Adopted Plan. Dr. Brunell had the opportunity to respond to my original report, and I responded to his analysis in my reply report. Defendants have now retained Mr. Morgan, whose report ostensibly replies to my Analysis of Plaintiffs' Proposed Alternative Congressional Plan (Feb. 21, 2014). However, Mr. Morgan also critiques my two previous reports on the Adopted Plan. In this way, Mr. Morgan attempts to bolster Dr. Brunell's analysis on topics already addressed in the previous exchange of expert reports.

More surprisingly, even while Mr. Morgan takes liberties in responding to my previous reports, he completely ignores entire portions of the analysis provided in all my reports. As discussed further below, Mr. Morgan's analysis is based on a misunderstanding of the Voting Rights Act, a misapprehension about the operating criteria guiding the redistricting process, and a misrepresentation of my previous reports.

Preclearance and "Greater Racial Balance"

Mr. Morgan suggests that the racial composition of the Adopted Third District was necessary to ensure preclearance under Section 5 of the Voting Rights Act, and further suggests that I "cannot - and [do] not - opine that the Alternative Plan could or would have received preclearance under Section 5" (Morgan p. 27). Mr. Morgan's analysis is plainly incorrect.

As an initial matter, Mr. Morgan ignores my observation that "the Alternative Third District hews much more closely to the Black VAP of the Remedial Third District [in light of *Moon v. Meadows*] than the Adopted Third District does" (McDonald Analysis of Alternative p. 9), and that the Remedial Third District "was also precleared under Section 5" (McDonald Reply to Brunell p. 11). In other words, the Department of Justice approved a previous version of the Third District with a Black VAP of 50.5%, which is *less* than Plaintiffs' Alternative Third District of 51.0%.[1] Implicit in this observation is that Plaintiffs' Alternative Third District would have been precleared by the Department of Justice. Indeed, the fact that the Adopted Third District contains a Black VAP closer to that of the Unconstitutional Third District (struck down by the Court in *Moon v. Meadows*) while the Alternative Third District contains a Black VAP substantially similar to that of the Remedial Third District, indicates that the Alternative Third District has a greater racial balance than the Adopted Third District.

Moreover, Mr. Morgan's Voting Rights Act "analysis" has no basis in either the Voting Rights Act or the maps approved by the Virginia General Assembly.

Mr. Morgan explains that since all of the majority-minority districts in the House of Delegates had at least a 55% Black VAP, the General Assembly "had

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[1] This calculation uses the inclusive method, which I opine is the correct one to apply as a comparison point to the Remedial District and with which neither Dr. Brunell nor Mr. Morgan have disagreed.

ample reason to believe" that a 55% Black VAP was "appropriate to obtain Section 5 preclearance, even if it meant raising the Black VAP above the levels in the benchmark plan" (Morgan pp. 26-27). This explanation is problematic for several reasons.

First, if the General Assembly used the House of Delegates districts as a guide for the Third Congressional District, there is nothing in the public record indicating that is the case. This information is therefore likely private information that Mr. Morgan possesses as a participant in the map-drawing process for the General Assembly, and it is undisclosed in his report.

Second, Mr. Morgan's statement that the General Assembly imposed a minimum racial quota of 55% Black VAP to the Third District, unsupported by any analysis of what was actually required by the Voting Rights Act, essentially concedes that the Adopted Third District is a racial gerrymander.

Third, Mr. Morgan is only telling part of the story, as the Senate's majority-minority districts were also precleared even though they contained Black VAPs less than 55%.

The Black VAP percentage for the five majority-minority Adopted Senate districts are listed in Table 1 (in descending order of the Black VAP). Like the House of Delegates districts Mr. Morgan refers to, these Senate districts overlap with the Third Congressional District. Notably, the Department of Justice precleared these districts in the Adopted Senate plan.

Senate District	Black VAP Exclusive Method	Black VAP Inclusive Method
5	53.6%	54.4%
18	53.5%	54.0%
16	53.1%	53.7%
2	51.2%	52.2%
9	50.8%	51.4%

Table 1. Adopted Senate Districts, Black VAP of African-American Majority Districts

Unlike the House of Delegates majority-minority districts, which all had a Black VAP of at least 55.2% (inclusive) or 55.9% (exclusive), none of the comparable Senate districts has a Black VAP over 55%. Following Mr. Morgan's logic that the district with the lowest Black VAP provides a guide as to the minimal acceptable level for the Third District, then the 9th Senate district serves as that guide, with a Black VAP of 50.8% (exclusive) or 51.4% (inclusive).

The House of Delegates was well aware of the Adopted Senate plan, since that chamber voted in favor of the bill enacting those districts in 2011. The map-drawers of the Adopted Congressional Districts were also well aware that the Department of Justice had precleared the Senate districts under Section 5 *before* the new congressional districts were adopted in 2012. Thus, it is disingenuous for Mr. Morgan to assert that a 55% Black VAP quota was what the "General Assembly believed was appropriate to obtain preclearance" (Morgan p. 27) of the Third District.

Fourth, a simple analysis of voting patterns demonstrates that the Alternative Third District does

not retrogress the minority group's ability to elect its candidate of choice. In the section of my initial report entitled "Historical Performance of Candidates to the Third District" (McDonald report p. 11), I describe how the African-American incumbent, Rep. Bobby Scott, has been reelected by overwhelming majorities, with an average vote share of 85%, from 2002 to 2012. In my reply report, I further explained: "Since the Third District has a Black VAP substantially less than 85%, simple logic reveals that there must be substantial White crossover voting for Rep. Scott such that the Third District's Black VAP can be safely lowered below the Adopted Third District's 56.3% (exclusive method) or 57.2% (inclusive method) and continue to elect the African-American candidate of choice" (McDonald Reply pp. 11-12).[2]

Finally, Mr. Morgan ignores evidence, supplied in his report, that further indicates the minority group

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[2] Notably, Mr. Morgan does not proclaim to be a voting rights expert. His curriculum vita describes his redistricting background and expertise as (1) "[p]erformed redistricting work in 19 states, in the areas of map drawing, problem solving, and redistricting software operation" and (2) "[p]erformed political work in 40 states, providing analysis and strategy to both statewide and legislative races" (Morgan CV, p. 2). His voting rights expertise is summarized as having occurred in the 1990-1991 redistricting cycle; when working on statewide and congressional redistricting plans in eight states he "[f]ocused primarily on Voting Rights Act issues with Black, Hispanic, and Asian communities" (Morgan CV, p. 2). What "focus" means is unknown; he has produced no scholarly work, never provided voting rights expert testimony, nor ever been invited to speak on voting rights issues. It is one thing to draw a map at the direction of political leaders; it is something much different to provide an expert opinion on whether a map adheres to Voting Rights Act and constitutional requirements.

will elect its candidate of choice in the Alternative Third District. Mr. Morgan aggregates into congressional districts the votes for candidates of the two major political parties in the 2008 and 2012 presidential elections (Morgan p. 12, 15). His statistics show that McCain's vote share was increased from 49.5% in the Benchmark Second District to 49.7% in the Adopted Second District, and that Romney's vote share was increased from 48.2% in the Benchmark Second District to 48.6% in the Adopted Second District. According to Mr. Morgan, these changes "improved the re-election prospects of Congressman Rigell" (Morgan p. 13).

In contrast, McCain's vote share in the Alternative Third District is 27.8%, while Romney's vote share is 25.4%. This is the strongest performing district by far for any political party in the Alternative Plan, one Rep. Rigell and every other incumbent would presumably look upon with envy. Yet later Mr. Morgan claims that the Alternative Third District has "less ... respect for incumbency than every other district" (Morgan p. 25). To arrive at this conclusion, Mr. Morgan has to pretend that, like Rep. Rigell, Democratic incumbent Rep. Scott was somehow vulnerable in the Benchmark Third District - where McCain won 24.7% and Romney won 23.3%. If not evident from these presidential elections, the history of congressional elections in the Benchmark Third District, described above, clearly shows that he is not. Mr. Morgan makes the further leap that slightly increasing the Republican performance in a strongly Democratic district such that the district is still strongly Democratic somehow weakens Rep. Scott. Mr. Morgan provides no support for this

assumption, and the district's electoral patterns directly refute it.

A Racial Bloc Voting Analysis

It is my opinion that Virginia bears the burden of providing a racial bloc voting analysis to substantiate its increase of the Black VAP in the Adopted Third District (let alone its apparent 55% Black VAP quota for the Adopted Third District). However, since neither of Defendants' experts has provided any analysis whatsoever to support the race-based redistricting of the Adopted Third District, I provide a racial bloc voting analyses of the 2008 presidential and 2009 governor elections here.

Racial bloc voting analyses estimate the vote shares that the minority candidate of choice may expect to receive from the minority community and the non-minority community. Courts have held that the most probative election contests are those in which a minority candidate competes against a White candidate. Therefore, I consider the 2008 presidential election more probative than the 2009 governor election. The unit of analysis is all VTDs within the localities that are part of the Adopted Third District. I define the minorities as Black, using the inclusive method, and non-minorities as non-Black.

I employ two commonly used methods, what are known as Goodman's Double Regression and Homogeneous Precinct Analysis. The statistics estimate racial groups' vote shares, which thereby reveal the candidate of choice for the minority community.

Goodman's Double Regression is a statistical procedure whereby the vote shares for the candidate of choice are essentially correlated with the racial composition of the VTDs. Goodman's Double Regression is a two-step statistical procedure that models (1) turnout of the minority community and (2) support for the major-party candidates, to arrive at an estimate that allows for dissimilar turnout.

Homogeneous Precinct Analysis examines the performance of the minority candidate of choice in the most heavily minority and most heavily non-minority VTDs. Here, I have chosen the ten most Black VTDs and ten most non-Black VTDs to be representative of homogeneous precincts. All are composed of 90%+ of their respective racial groups.

The estimates from the racial bloc voting analyses are presented in Table 2.

		Percent Voting for Black Candidate of Choice	
		Goodman's Double Regression	**Homogeneous Precincts (average of top ten)**
President 2008	*Black*	104.3%	96.1%
	Non-Black	38.6%	43.6%
	Estimated Vote for Candidate of Choice in 51% BVAP District	69.9%	70.3%
Governor 2009	*Black*	110.7%	94.2%
	Non-Black	28.8%	33.2%
	Estimated Vote for	65.1%	64.4%

	Candidate of Choice in 51% BVAP District		

Table 2. Racial Bloc Voting Analysis

In the 2008 presidential election, according to the Goodman's Double Regression method, the Black candidate of choice received 104.3% support from Blacks and 38.8% from non-Blacks. According to the Homogeneous Precinct Analysis, the Black candidate of choice received 96.1% support from Blacks and 43.6% from non-Blacks.

In the 2009 governor election, according to the Goodman's Double Regression method, the Black candidate of choice received 110.7% support from Blacks and 28.8% from non-Blacks. According to the Homogeneous Precinct Analysis, the Black candidate of choice received 94.2% support from Blacks and 33.2% from non-Blacks.

Estimates over 100% support for a candidate are, of course, impossible.[3] The standard practice in this situation is to interpret values over 100% as equal to 100%. I do so to simulate the expected vote in a district composed of 51% Black VAP, the Black VAP of the Alternative Third District, by multiplying the

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[3] My examination of the raw data leads me to believe that they arise from uneven turnout across some VTDs, likely related to sizable military populations found in the Tidewater region that vote absentee in other locations. My examination of the raw data, and the confirming estimates from the Homogeneous Precinct Analysis, do not indicate the presence of statistical issues that would greatly affect Goodman's Double Regression estimates. Both methods estimate similar support among racial groups for the minority candidate of choice.

Black support estimate from both methods by 51% and the non-Black by 49% and then adding these two values together.

There are two important points to draw from this racial bloc voting analysis.

First, the racial bloc voting analyses corroborate the evidence that the minority candidate of choice would be elected from Alternative District Three. The Black candidates of choice receive nearly unanimous support from Black voters and in the mid to high 30% crossover vote from non-Black voters. The baseline support for the minority candidates of choice in a 51% Black VAP district is in the mid to upper 60% range.

Second, these statistics provide no basis for a "sensible" (Brunell p. 3) increase in the Black VAP of District Three to a level above 51% Black VAP (and certainly not above the benchmark Black VAP of the district) to comply with Section 5 of the Voting Rights Act. To be sure, they provide no basis whatsoever for a 55% Black VAP quota.

Mr. Morgan Mischaracterizes Plaintiffs' Alternative Plan

Mr. Morgan and I agree on a key point, that "Plaintiffs' Alternative Districts are different from the Adopted Districts only in the shared boundary between the Adopted Second and Third Districts" (McDonald Analysis of Alternative p. 1), or as Mr. Morgan states, that "the only difference between the Enacted Plan and the Alternative Plan is the placement of the boundary between Districts 2 and 3" (Morgan p. 3).

We also agree that, by my own analysis, Alternative District 3 retains many geographical features I previously opined indicated where race predominated in the creation of the Adopted Third District. As I state in my analysis of Plaintiffs' Alternative Plan:

> Alternative Third District does not cure all the problems identified in the Adopted Third District, but, in my opinion, the use of race is narrowly tailored to maintain a majority-minority district without unnecessarily compromising traditional redistricting criteria. Additionally, *Plaintiffs' attempt to minimize the changes to the Adopted Map* contributes in large part to the fact that the Alternative Map does not cure all of the issues identified in my first report (McDonald Analysis of Alternative p. 9, emphasis added).

Where we disagree is in Mr. Morgan's opinion that the "the Alternative Plan is at least as race-conscious, and arguably even more race-conscious" than the Adopted Plan (Morgan p. 10). Mr. Morgan claims that "[n]one of the Alternative Plan's trades between Districts 1, 2 and 3 are explained on non-racial grounds" (Morgan p. 10). Mr. Morgan only mentions two non-racial grounds of "politics and incumbency protection" (Morgan p. 10). To arrive at his opinion that no trade can be described on non-racial grounds, Mr. Morgan must discount entire sections of my analysis of Plaintiffs' Alternative Plan which describe how (1) "the Alternative Districts more closely adhere to locality boundaries" (McDonald Analysis of Alternative p. 3), are (2) "more compact" (ibid p. 6), and (3) no longer use water

contiguity with the effect of "bypassing White communities" (ibid p. 7).

Since the substance of our disagreement begins with these three traditional redistricting principles described in my report, I respond to these in turn.

Locality and VTD Splits

In my analysis of Plaintiffs' Alternative Third District, I provide evidence that "[t]he Alternative Districts more closely adhere to locality boundaries than the Adopted Districts" (McDonald Analysis of Alternative, p. 3). Mr. Morgan agrees that the Alternative Plan splits "*one fewer locality* than the Enacted Plan" (Morgan p. 19, original emphasis).[4]

To arrive at Mr. Morgan's assertion that "[t]here is no reason to conclude that this marginal difference in split localities is significant" (Morgan p. 20), Mr. Morgan ignores, as reported in Table 3 of my analysis of Plaintiffs' Alternative Plan, that in the Adopted Plan "a total of 241,096 persons, or 33.1% of the total population, are affected by the splits [at issue] of these districts" (McDonald Analysis of Alternative, p. 5). In contrast. in Plaintiffs' Alternative Plan, a small split of Portsmouth with the intent to balance districts' populations affects "1,016 total persons, or 0.14% of the total population of these districts" (ibid). The aligning of district boundaries in Plaintiffs' Alternative Plan is not

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[4] Mr. Morgan quibbles with my counting of locality splits (Morgan p. 19), intended to illustrate how the number of times districts splitting localities is further reduced, isolating only the changes from the Adopted Plan to the Alternative Plan. Since we agree that the number of locality splits is reduced, I will proceed with my analysis on this point of agreement.

"marginal" (Morgan p. 20) as it greatly reduces the affected populations of those whose localities are split by district lines, by hundreds of thousands of people.

Better aligning district boundaries with locality boundaries, and thereby respecting the expressed wishes of the citizens of these localities (ibid, see pp. 5-6 for citizens' statements), is clearly a non-racial goal that is better satisfied by Plaintiffs' Alternative Plan.

On the issue of VTD splits, Mr. Morgan reopens an issue previously discussed by Dr. Brunell and myself: how to count splits where zero population is involved (what Virginia refers to as "technically split" in their Section 5 submission to the Department of Justice (Section 5 Statement of Change p. 11)). Mr. Morgan favors ignoring "technically split" VTDs, as he notes a "net of 6 such splits that Dr. McDonald identifies as different between the plans are in the 'technically split' precincts involving no population. Where population is concerned, the numbers of split VTDs and VTD splits in the Enacted Plan are the same as the numbers of split VTDs and VTD splits in the Alternative Plan" (Morgan pp. 22-23).[5] I agree with this characterization, but there is an important racial

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[5] Mr. Morgan again quibbles about my method of counting VTD splits (Morgan p. 21), as though the counting method is somehow significant. It is not in this instance. No VTD is split by more than two districts. Counting the number of times VTDs split districts or the number of districts split VTDs *results in the same number*. Mr. Morgan disingenuously proceeds "using Dr. McDonald's preferred measure" (ibid p. 22) as though his favored counting method for VTD splits would produce a different number, when it would not.

component to these "technically split" VTDs that is intertwined with contiguity.

Contiguity

Mr. Morgan disregards an important characteristic of these "technically split" VTDs. They are VTDs that extend into the James River and are split with the express purpose of using the James River to bypass White communities. Mr. Morgan never acknowledges the fact that the "*Moon v. Meadows* court found water contiguity without a connecting bridge to be a factor weighed in its determination that race predominated in the creation of the Unconstitutional Third District" (McDonald Reply to Brunell p. 10). The six fewer "technically split" VTDs in Plaintiffs' Alternative Plan directly rectify VTD splits in the Adopted Plan where water was used without a connection to bypass White communities.

Furthermore, as I noted in my initial report, the Adopted Plan similarly uses water contiguity in Norfolk, in this case to bypass Black communities so that White communities can be placed in the Second District (McDonald Report p. 21). By assigning the entirety of Norfolk to the Second District, the Alternative Plan rectifies this use of water to bypass racial communities.

Mr. Morgan is therefore incorrect in stating that "[t]he Alternative Plan thus achieves contiguity in District 3 exactly the same way as the Enacted Plan" (Morgan p. 24). While the Adopted Plan uses water contiguity in order to bypass racial communities, the Alternative Plan uses it to connect adjacent localities separated by water. Thus, it is my opinion, and consistent with the reasoning of the *Moon v.*

Meadows Court, that Plaintiffs' Alternative Plan rectifies a constitutionally improper use of race, thereby converting the goal of water contiguity that was used for a racial purpose into a non-racial goal.

Compactness

Mr. Morgan does not dispute the fact that, based on the three compactness Virginia relied upon in its Section 5 submission (Section 5 Statement of Change, pp. 10-11) and analyzed in my reports, Adopted District Three is the least compact district. Mr. Morgan agrees that Adopted District Three is less compact on these three measures (Morgan p. 17). Mr. Morgan also agrees that Alternative District Three is no longer the least compact on these measure (ibid p. 18).[6]

Mr. Morgan complains that I do not evaluate at least two additional compactness measures, the Ehrenburg test and the Population Polygon Test. Mr. Morgan fails to point out, however, that the three compactness measures I used were the same ones used by the General Assembly in determining how well districts met the Virginia constitutional requirement of compactness. Mr. Morgan's cherry-picking of additional compactness measures adds little to the analysis. There are over thirty different compactness measures discussed by scholars in the

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[6] Mr. Morgan helpfully corrects a typo where the Schwartzberg measure for the Alternative District Three is reported as 2.04 when it is in fact 2.61 (McDonald Analysis of Alternative p. 7). This error does not affect my conclusion that Alternative District Three is more compact according to the Schwartzberg measure and is no longer the least compact district.

field.[7] I do not evaluate all these compactness measures and, significantly, neither does Mr. Morgan.

Mr. Morgan notes that I do "not suggest that Alternative District 3 meets a professionally accepted standard for minimally acceptable compactness, which Enacted District 3 does not satisfy and Alternative District 3 does" (Morgan p. 17). Mr. Morgan is "not aware of any such standard" (ibid), nor am I. The scholarly consensus is that there is no one-size-fits-all standard for compactness measures; they are interpreted in the context of the jurisdiction being redistricted and the characteristics of the compactness measure.[8]

I have viewed the district boundaries, considered the three compactness measures I have previously examined, and considered Mr. Morgan's additional two compactness measures. My opinion remains unchanged: (1) the non-compact character of the Third District is indicative that improper racial

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[7] Richard G. Niemi, Bernard Grofman, Carl Carlucci and Thomas Hofeller. "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering." *The Journal of Politics* Vol. 52, No. 4 (Nov., 1990), pp. 1155-1181.

[8] For example, the Population Polygon Test, *ceteris paribus*, tends to score districts containing within their borders a uniform population density as more compact than those that do not. Thus, District Ten fares poorly on this measure since it combines densely populated urban areas of Northern Virginia with lightly populated rural areas stretching to the West Virginia border. District Three scores better than District Ten because District Three is comparably composed of more densely-populated urban areas.

considerations were present in the formation of the Adopted Third District, particularly with respect to how the Adopted Third District segregates non-compact racial communities in the Hampton, Newport News and Norfolk localities; and (2) the Alternative Third District, by not dividing non-compact racial communities within these localities along racial lines, is more compact and reduces the racial character of the non-compactness of the Third District.

The 2011 Senate Criteria and Senate Congressional Plan

Mr. Morgan continues his analysis by examining additional factors to determine "whether the Alternative Plan achieves the political goals in the Enacted Plan" (Morgan p. 14). The political goals Mr. Morgan repeatedly refers to are the criteria adopted by the Democratically-controlled Virginia Senate in 2011. A section of my reply report to Dr. Brunell entitled "The Criteria Used for the Congressional Redistricting" (McDonald Reply pp. 2-4) explains that the House of Delegates "never formally adopted any redistricting criteria" and that "the criteria adopted by the Democratic-controlled Senate in 2011 were not binding on the Republican-controlled Senate in 2012" (McDonald Reply p. 3).

Although Mr. Morgan claims to have read my reply report to Dr. Brunell, he never refutes these facts about the circumstances revolving around the legislative process that produced the Adopted Plan. Mr. Morgan, like Dr. Brunell, must overlook the glaring post-hoc rationalization implied in Virginia's Section 5 submission that the 2011 Senate Criteria

guided the Adopted Plan because there is only one plan adopted by a Virginia legislative body that was ostensibly drawn to adhere to those criteria. It is not the Adopted Plan. It is the congressional plan the Senate adopted in 2011.

The House of Delegates, where the Adopted congressional plan originated, *debated and then failed to adopt any criteria for congressional redistricting*. As a result, the House of Delegates had no formal goals or criteria other than the requirements of federal and state law: (1) equal population, (2) adherence to the Voting Rights Act, (3) contiguity, and (4) compactness (Virginia Constitution, Article II § 6).

All other criteria that Dr. Brunell and Mr. Morgan discuss as guiding the development of the Adopted congressional plan are distractions, since they were not formally operative. While I analyze the components of the 2011 Senate Criteria in my previous reports, it is for the purpose of following the methodology applied by the *Moon v Meadows* court to analyze the degree to which race predominated, not to assess how well the Adopted or Alternative Plans adhere to the non-operative 2011 Senate Criteria.

Race or Politics?

Mr. Morgan states that I do "not even mention the political considerations in the Enacted Plan, much less separate those considerations from race and show that race predominated in the Enacted Plan" (Morgan p. 11). In so doing, Mr. Morgan has ignored the section in my reply report to Dr. Brunell entitled clearly "Race or Politics?" (McDonald Reply pp. 6-8). To summarize, I examined the racial and political

character of the VTDs in the localities in or adjacent to the Third District and "conclude[d] from this analysis that race trumped politics" (McDonald Reply to Brunell p. 8), in that among VTDs with similar political characteristics, predominantly greater Black VAP VTDs were assigned to the Adopted Third District. Mr. Morgan does not dispute this fact.

Mr. Morgan himself notes that, according to the non-operative 2011 Senate Criteria, compliance with the Voting Rights Act was "the highest priority for the Enacted Plan after compliance with the Constitutional equal-population requirement" (Morgan p. 25). By his own analysis, then, all other criteria would be therefore subsumed to compliance with the Voting Rights Act.

Mr. Morgan asserts that protecting Rep. Rigell, the Republican incumbent of the Second District, was a goal of the Adopted Plan. This goal is not specifically noted in the non-operative 2011 Senate Criteria, and Mr. Morgan does not reveal his basis for knowing this purported goal. Nor does he analyze how this goal might conflict with the Senate Criteria's higher priority of compliance with the Voting Rights Act.[9]

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[9] While it may seem self-evident that protection of Rep. Rigell would be a goal of Virginia Republicans since he is a Republican incumbent member of Congress, there are numerous examples where a party did not protect their incumbents because other considerations intervened. For instance, in 2012, Louisiana Republicans paired Republican incumbents Rep. Boustany, Jr. and Rep. Landry. Louisiana had lost a congressional seat to apportionment, and as prominent Republican consultant Jim Ellis noted "[s]ince the New Orleans-anchored 2nd CD is a Voting Rights Act protected district, the Republicans had no other choice but to forfeit a seat." *See*

For the sake of argument, however, I will proceed by entertaining Mr. Morgan's assertion (Morgan pp. 11-16) that protecting Rep. Rigell was a legitimate political goal.

It is instructive, then, that the 2011 Senate's congressional plan also protects Rep. Rigell without increasing the Black VAP of the Third District. A map showing how the Senate approached protecting Rep Rigell is displayed in Figure 1 of my reply report to Dr. Brunell (McDonald Reply p. 4). Instead of assigning portions of Hampton and Newport News to the Second District, the Second District is given the localities to the north of Hampton and Newport News: James City, Poquoson, Williamsburg, and York.

As reported by Mr. Morgan (Morgan p. 12), in the 2008 presidential election Obama received 49.3% and McCain received 49.7% of the vote within the Adopted Second District, a difference of 0.4 percentage points favoring McCain. The Virginia legislature provides reports of the 2008 presidential vote in the 2011 Senate Second District on the redistricting website.[10] In the 2011 Senate's Second Congressional District, Obama received 44.6% of the vote while McCain received 54.6%, a 10.0 percentage point difference favoring McCain. Thus, the 2011 Senate plan demonstrates how the political goal of protecting Rep. Rigell can be achieved without

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http://jimellisinsights.wordpress.com/2012/12/10/boustany-wins-in-la-and-why/, accessed March 21, 2014.

[10] http://redistricting.dls.virginia.gov/2010/Data/congressional%20plans/SB5004_Locke_substitute/SB5004_Locke_substitute.htm.

unnecessarily increasing the Black VAP of the Third District.

Furthermore, the map-drawers of the 2011 Senate plan apparently believed the Black VAP of the Third District could be safely lowered to 42.2% (exclusive) or 43.0% (inclusive) and still obtain preclearance from the Department of Justice. It is noteworthy that the incumbent, Rep. Scott, publicly provided support for this configuration of the Third District.[11]

District Cores

Like Dr. Brunell (Brunell p. 6), Mr. Morgan opines that the preservation of district cores, found in the non-operative 2011 Senate Criteria, was a guiding redistricting principle (Morgan pp. 24-25). Neither expert has addressed my observation that "if preservation of district cores was a value the legislature held in high regard, the legislature would not have removed population from the under-populated Benchmark Third District, as that only made the redistricting task more complicated. Removal of population is only to *the detriment* of the preservation of cores" (McDonald Reply to Brunell p. 9, original emphasis).

Mr. Morgan instead provides statistics purporting to demonstrate that Alternative District Three, which preserves 69.2% of its predecessor district, is the "*worst performing* district in terms of preservation of cores" (Morgan p. 24, original emphasis). Setting aside the issue that the Benchmark District is

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[11] See, e.g., http://www.washingtonpost.com/blogs/virginia-politics/post/scott-backs-senates-influence-district-proposal/2011/04/11/AfpNs1LD_blog.html.

constitutionally suspect (McDonald Reply to Brunell p. 6) and therefore the preservation of district cores would simply perpetuate any constitutional defect, the 2011 Senate's congressional plan provides perspective on how the body that adopted the Senate Criteria interpreted and applied the preservation of district cores. While 386,968 residents of Benchmark District Three were assigned to the 2011 Senate's Third District, 503,129 residents of Benchmark District Three were assigned to Alternative District Three. Thus, the Alternative Third District performs substantially better than the 2011's Senate's Third District, which was ostensibly drawn to achieve the goal of preservation of district cores.

The Senate, in practice, did not weigh preservation of district cores highly over other criteria. I am not the only expert who comes to this assessment, as Dr. Brunell provides a laundry list of trivial reasons why he believes district cores may be violated, including "want[ing] their grandbaby's preschool in their district" (Brunell p. 7).

Conclusion

Upon reviewing Mr. Morgan's report, my conclusions not only remain the same but are bolstered. Race was the predominant consideration in the formation of the Adopted Third District. Virginia and Defendants' experts have not provided compelling evidence that the Black VAP of the Benchmark Third District should be increased to comply with the Voting Rights Act. Indeed, Mr. Morgan provides glaring evidence of an unconstitutional use of race when he asserts a racial

quota of 55% Black VAP was adopted for the Third District by the General Assembly.

Furthermore, all evidence indicates that a district like Plaintiffs' Alternative Third District, designed to be narrowly tailored to elect a Black candidate of choice with a Black VAP of 51.0%, would indeed elect the minority candidate of choice and present no "obstacles to preclearance" (Morgan p. 4).

I declare that under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on March 24, 2014 in Fairfax, Virginia.

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Michael P. McDonald

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DAWN CURRY PAGE, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 3:13-cv-678**
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	
Defendants.	)	

INTERVENOR-DEFENDANT CONGRESSMAN ERIC CANTOR'S ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

Subject to and without waiving the objections asserted in the Intervenor-Defendants Virginia Representatives' Objections and Responses To Plaintiffs' Interrogatories And Requests For Production filed on January 3, 2014, Intervenor-Defendant Congressman Eric Cantor hereby states as follows his Answers To Plaintiffs' Interrogatories And Requests For Production.

INTERROGATORIES

INTERROGATORY NO. 1: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Congressional Redistricting. For each individual, specify the individual's name, title, employer, last- known contact

information, role in the 2012 Congressional Redistricting, and substance of the communication.

RESPONSE: I discussed redistricting with Speaker Bill Howell, Delegate Bill Janis, and Senator Ryan McDougle, who were involved in enacting the redistricting plan in the General Assembly. Their last-known contact information is Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900.

INTERROGATORY NO. 2: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Section 5 Submission or any part of it. For each individual, specify the individual's name, title, employer, last- known contact information, role in developing the 2012 Section 5 Submission, and substance of the communication.

RESPONSE: I did not communicate with any member or employee of the Virginia General Assembly regarding the 2012 Section 5 Submission.

INTERROGATORY NO. 3: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting. For each individual or entity, specify the individual or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division of Legislative Services has publicly disclosed documents, materials, and maps that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents, materials, and/or maps.

I believe the members of the General Assembly most involved in 2012 Congressional Redistricting were Delegates Bill Janis and Rob Bell.

INTERROGATORY NO. 4: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with developing the 2012 Section 5 submission or any part of it. For each individual or entity, specify the individual's or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to

draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division Of Legislative Services has publicly disclosed documents and other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission, as well as portions of the Section 5 submission itself, at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx. The entire 2012 Section 5 submission is available for public inspection at the Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission.

INTERROGATORY NO. 5: Identify each source of data that you used or reviewed related to the 2012 Congressional Redistricting. For each source, specify the content of the data, the source from which it came, and how it was used in the 2012 Congressional Redistricting.

RESPONSE: I reviewed data from the 2010 United States Census and election data compiled from the Virginia State Board of Elections.

Data related to the 2012 Congressional Redistricting is available at the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

INTERROGATORY NO. 6: Identify every meeting you attended related to the 2012 Congressional Redistricting process. For each meeting, specify the date, location, attendees, and subjects discussed at the meeting.

RESPONSE: Around September 1, 2011, I attended a meeting with then-Virginia Governor Bob McDonnell where we discussed redistricting.

I attended a meeting at the National Republican Congressional Committee with other Republican Members of Congress from Virginia where we discussed redistricting.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST NO. 1: Please produce all maps and draft maps related to the 2012 Virginia Redistricting.

RESPONSE: I have no documents responsive to this request beyond what may already be available to Plaintiffs in the public record. I refer the Plaintiffs to the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

* * *

[Page 7]

RULE 26(G) CERTIFICATION

I have read the foregoing Answers to Plaintiffs' Interrogatories And Requests For Production and certify that, to the best of my knowledge, information, and belief, formed after a reasonable inquiry, they comply with the requirements of Federal Rule of Civil Procedure 26(g)(1)(B).

DATED this 13th day of January, 2014.

By: Eric Cantor

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DAWN CURRY PAGE, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 3:13-cv-678**
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	
Defendants.	)	

INTERVENOR-DEFENDANT CONGRESSMAN RANDY FORBES' ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

Subject to and without waiving the objections asserted in the Intervenor-Defendants Virginia Representatives' Objections and Responses To Plaintiffs' Interrogatories And Requests For Production filed on January 3, 2014, Intervenor-Defendant Congressman Randy Forbes, hereby states as follows his Answers To Plaintiffs' Interrogatories And Requests For Production.

INTERROGATORIES

INTERROGATORY NO. 1: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Congressional Redistricting. For each individual, specify the individual's name, title, employer, last-known contact

information, role in the 2012 Congressional Redistricting, and substance of the communication.

RESPONSE: I was approached by then-Delegate Bill Janis, who sponsored the redistricting bill in the General Assembly in 2011. Mr. Janis asked for my feedback and comments on the redistricting plan, but I did not provide any. Mr. Janis's last-known contact information is 2150 Plainview Business Center, Pohawtan, VA 23219.

I also was approached by Delegate Rob Bell, who informed me that he was sponsoring the redistricting bill in the General Assembly in 2012. Mr. Bell's last-known contact information is General Assembly Building P.O. Box 406, Richmond, VA 23218, 804-698-1058.

INTERROGATORY NO. 2: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Section 5 Submission or any part of it. For each individual, specify the individual's name, title, employer, last- known contact information, role in developing the 2012 Section 5 Submission, and substance of the communication.

RESPONSE: I did not communicate with any member or employee of the Virginia General Assembly regarding the 2012 Section 5 Submission.

INTERROGATORY NO. 3: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered,

consulted, or created in connection with the 2012 Congressional Redistricting. For each individual or entity, specify the individual or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division of Legislative Services has publicly disclosed documents, materials, and maps that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting at its Redistricting website, http://redistricting.dls.virginia.gov/201 O/Default.aspx.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents, materials, and/or maps.

I believe the members of the General Assembly most involved in 2012 Congressional Redistricting were Delegates Bill Janis and Rob Bell.

INTERROGATORY NO. 4: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with developing the 2012 Section 5 submission or any part of it. For each individual or entity,

specify the individual's or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division Of Legislative Services has publicly disclosed documents and other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission, as well as portions of the Section 5 submission itself, at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx. The entire 2012 Section 5 submission is available for public inspection at the Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission.

INTERROGATORY NO. 5: Identify each source of data that you used or reviewed related to the 2012 Congressional Redistricting. For each source, specify the content of the data, the source from which it came, and how it was used in the 2012 Congressional Redistricting.

RESPONSE: I reviewed data from the 2010 United States Census and election data compiled from the Virginia State Board of Elections.

Data related to the 2012 Congressional Redistricting is available at the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

INTERROGATORY NO. 6: Identify every meeting you attended related to the 2012 Congressional Redistricting process. For each meeting, specify the date, location, attendees, and subjects discussed at the meeting.

RESPONSE: I do not recall attending any meetings related to the 2012 Congressional Redistricting process.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST NO. 1: Please produce all maps and draft maps related to the 2012 Virginia Redistricting.

RESPONSE: I have no documents responsive to this request beyond what may already be available to Plaintiffs in the public record. I refer the Plaintiffs to the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

* * *

[Page 7]

RULE 26(G) CERTIFICATION

I have read the foregoing Answers to Plaintiffs' Interrogatories And Requests For Production and certify that; to the best of my knowledge, information,

and belief, formed after a reasonable inquiry, they comply with the requirements of Federal Rule of Civil Procedure 26(g) (l)(B).

DATED this 13th day of January, 2014.

By: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAWN CURRY PAGE, et al., **Plaintiffs** **v.** **VIRGINIA STATE BOARD OF ELECTIONS, et al.,** **Defendants.**	)	**Civil Action No.: 3:13-cv-678**

INTERVENOR-DEFENDANT CONGRESSMAN BOB GOODLATTE'S ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

Subject to and without waiving the objections asserted in the Intervenor-Defendants Virginia Representatives' Objections and Responses To Plaintiffs' Interrogatories And Requests For Production filed on January 3, 2014, Intervenor-Defendant Congressman Bob Goodlatte, hereby states as follows his Answers To Plaintiffs' Interrogatories And Requests For Production.

INTERROGATORIES

INTERROGATORY NO. 1: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Congressional Redistricting. For each individual, specify the individual's

name, title, employer, last-known contact information, role in the 2012 Congressional Redistricting, and substance of the communication.

RESPONSE: I communicated regarding redistricting with the following Members of the Virginia Assembly, all of whose last-known contact information is Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900: Senator Ralph Smith; Delegate Ben Cline; Delegate Rob Bell; Delegate Jill Holtzman Vogel; Delegate Todd Gilbert; Speaker Bill Howell; Delegate Bill Janis; and Senator Mark Obenshain.

INTERROGATORY NO. 2: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Section 5 Submission or any part of it. For each individual, specify the individual's name, title, employer, last-known contact information, role in developing the 2012 Section 5 Submission, and substance of the communication.

RESPONSE: I did not communicate with any member or employee of the Virginia General Assembly regarding the 2012 Section 5 Submission.

INTERROGATORY NO. 3: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting. For each individual or entity, specify the individual or

entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division of Legislative Services has publicly disclosed documents, materials, and maps that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting at its Redistricting website, http://redistricting .dls.virginia.gov/2010/Default.aspx.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents, materials, and/or maps.

I believe the members of the General Assembly most involved in 2012 Congressional Redistricting were Delegates Bill Janis and Rob Bell.

INTERROGATORY NO. 4: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with developing the 2012 Section 5 submission or any part of it. For each individual or entity, specify the individual's or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division Of Legislative Services has publicly disclosed documents and other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission, as well as portions of the Section 5 submission itself, at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx. The entire 2012 Section 5 submission is available for public inspection at the Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission.

INTERROGATORY NO. 5: Identify each source of data that you used or reviewed related to the 2012 Congressional Redistricting. For each source, specify the content of the data, the source from which it came, and how it was used in the 2012 Congressional Redistricting.

RESPONSE: I reviewed data from the 2010 United States Census and election data compiled from the Virginia State Board of Elections.

Data related to the 2012 Congressional Redistricting is available at the Division of

Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov.2010/Default.aspx.

INTERROGATORY NO. 6: Identify every meeting you attended related to the 2012 Congressional Redistricting process. For each meeting, specify the date, location, attendees, and subjects discussed at the meeting.

RESPONSE: I attended a meeting at the National Republican Congressional Committee with other Republican Members of Congress from Virginia and some chiefs of staff. We discussed redistricting.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST NO. 1: Please produce all maps and draft maps related to the 2012 Virginia Redistricting.

RESPONSE: I have no documents responsive to this request beyond what may already be available to Plaintiffs in the public record. I refer the Plaintiffs to the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

REQUEST NO. 2: Please produce all communications with the General Assembly related to the 2012 Virginia Redistricting, including without limitation all communications

* * *

[Page 7]

RULE 26(g) CERTIFICATION

I have read the foregoing Answers to Plaintiffs' Interrogatories And Requests For Production and

certify that, to the best of my knowledge, information, and belief, formed after a reasonable inquiry, they comply with the requirements of Federal Rule of Civil Procedure 26(g)(1)(B).

DATED this 13th day of January, 2014.

By:_____

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DAWN CURRY PAGE, et al., **Plaintiffs** **v.** **VIRGINIA STATE BOARD OF ELECTIONS, et al.,** **Defendants.**	)	**Civil Action No.: 3:13-cv-678**

INTERVENOR-DEFENDANT CONGRESSMAN MORGAN GRIFFITH'S ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

Subject to and without waiving the objections asserted in the Intervenor-Defendants Virginia Representatives' Objections and Responses To Plaintiffs' Interrogatories And Requests For Production filed on January 3, 2014, Intervenor-Defendant Congressman Morgan Griffith, hereby states as follows his Answers To Plaintiffs' Interrogatories And Requests For Production.

INTERROGATORIES

INTERROGATORY No. 1: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Congressional Redistricting. For each individual, specify the individual's

name, title, employer, last-known contact information, role in the 2012 Congressional Redistricting, and substance of the communication.

RESPONSE: To the extent I had any such communications while I was serving as a Member of the General Assembly, I invoke legislative privilege and decline to answer.

After I left the General Assembly in January 2011, I had communications with the following Members of the General Assembly.

1. Senator Bill Carrico, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900. I had a conversation regarding redistricting and stated something along the lines of "I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District."

2. Delegate Annie B. Crockett-Stark, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900. I had a conversation regarding redistricting and stated something along the lines of "I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District."

3. Delegate Terry Kilgore, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900. I had a conversation regarding redistricting and stated something along the lines of "I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as

possible. It would be nice if my house were in the 9th Congressional District."

4. Delegate Will Morefield, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900. I had a conversation regarding redistricting and stated something along the lines of "I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District."

5. Delegate Dave Nutter, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900. I had a conversation regarding redistricting and stated something along the lines of "I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District."

6. Delegate Bill Janis, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900. I had a conversation regarding redistricting and stated something along the lines of "I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District."

7. Roby Ingram, retired Virginia Legislative Services, Legal Staff, Courts Committee, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219; (804) 698-1900. We discussed how many folks were in the District and how many folks would be added by redistricting.

8. Sen. William Wampler, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900. I had a conversation regarding redistricting and stated something along the lines of "I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District."

INTERROGATORY NO. 2: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Section 5 Submission or any part of it. For each individual, specify the individual's name, title, employer, last-known contact information, role in developing the 2012 Section 5 Submission, and substance of the communication.

RESPONSE: To the extent I had any such communications while I was serving as a Member of the General Assembly, I invoke legislative privilege and decline to answer.

INTERROGATORY NO. 3: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting. For each individual or entity, specify the individual or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division of Legislative Services has publicly disclosed documents, materials, and maps that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents, materials, and/or maps.

I believe the members of the General Assembly most involved in 2012 Congressional Redistricting were Delegates Bill Janis and Rob Bell.

Because I lived outside the 9th District in 2010 and redistricting was a central issue in my 2010 congressional campaign, my former campaign staff may have documents or mailings related to the 2012 Congressional Redistricting.

Any constituent of the 9th District who saved campaign mailers sent by me or then Representative Rick Boucher in 2010 may have that document related to the 2012 Congressional Redistricting.

Kelly Lungren McCollum, my congressional Chief of Staff, has emails regarding meetings, paying fees, census data, news articles on redistricting, and draft press statement(s).

The United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C.

20530, (202) 514-2000, likely has possession of documents, materials, and/or maps.

The Office of the Governor of Virginia, 111 East Broad Street, Richmond, VA 23219, likely has possession of documents, materials, and/or maps.

The House of Delegates of Virginia, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900, likely has possession of documents, materials, and/or maps.

Members of the House of Delegates of Virginia, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900, likely have possession of documents, materials, and/or maps.

Senate of Virginia, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900, likely has possession of documents, materials, and/or maps.

Members of the Senate of Virginia, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900, likely have possession of documents, materials, and/or maps.

The Virginia State Board of Elections, Washington Building, First Floor, 1100 Bank Street, Richmond, VA 23219, (804) 864-8901, likely has possession of documents, materials, and/or maps.

Library of Virginia—Archives of the Commonwealth, 800 E. Broad Street, Richmond, VA 23219, (804) 692-3500, likely has possession of documents, materials, and/or maps.

INTERROGATORY NO. 4: Identify each individual, agency, company, organization, governmental body, or other entity that has or

likely has possession of documents or other materials that were used, considered, consulted, or created in connection with developing the 2012 Section 5 submission or any part of it. For each individual or entity, specify the individual's or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division Of Legislative Services has publicly disclosed documents and other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission, as well as portions of the Section 5 submission itself, at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

The entire 2012 Section 5 submission is available for public inspection at the Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission.

The United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C.20530,

(202) 514-2000, likely has possession of documents, materials, and/or maps.

The Office of the Governor of Virginia, 111 East Broad Street, Richmond, VA 23219, likely has possession of documents, materials, and/or maps.

The House of Delegates of Virginia, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900, likely has possession of documents, materials, and/or maps.

Senate of Virginia, Virginia State Capitol, 910 Capitol Street, Richmond, VA 23219, (804) 698-1900, likely has possession of documents, materials, and/or maps .

INTERROGATORY NO. 5: Identify each source of data that you used or reviewed related to the 2012 Congressional Redistricting. For each source, specify the content of the data, the source from which it came, and how it was used in the 2012 Congressional Redistricting.

RESPONSE: I reviewed data from the 2010 United States Census and election data compiled from the Virginia State Board of Elections.

Data related to the 2012 Congressional Redistricting is available at the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

INTERROGATORY NO. 6: Identify every meeting you attended related to the 2012 Congressional Redistricting process. For each meeting, specify the date, location, attendees, and subjects discussed at the meeting.

RESPONSE: To the extent I attended any such meetings while I was serving as a Member of the General Assembly, I invoke legislative privilege and decline to answer.

After I left the General Assembly in January 2011, I attended the following meetings. The dates listed below are based on calendar entries as I do not recall specific dates.

1. January 24, 2011: Meeting to discuss how the 9th Congressional District lines could change with the redistricting. Attendees were Randy Hinaman, my consultant, Carlyle Gregory, my consultant, Kelly Lungren McCollum, my Chief of Staff, and me. We met in a room at the National Republican Congressional Committee.

2. March 1, 2011: Meeting to discuss how the Congressional District could change with redistricting. To the best of my recollection, the attendees were Congressman Eric Cantor, Congressman Scott Rigell, Congressman Rob Wittman, Congressman Randy Forbes, Congressman Robert Hurt, Congressman Bob Goodlatte, Congressman Frank Wolf, and me. Also in attendance were several of our Chiefs of Staff. I know my Chief, Kelly Lungren

* * *

[Page 11]

RULE 26(g) CERTIFICATION

I have read the foregoing Answers to Plaintiffs' Interrogatories And Requests For Production and certify that, to the best of my knowledge, information, and belief, formed after a reasonable inquiry, they

comply with the requirements of Federal Rule of Civil Procedure 26(g)(l)(B).

DATED this 13th day of January, 2014.

By: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAWN CURRY PAGE, et al., **Plaintiffs** **v.** **VIRGINIA STATE BOARD OF ELECTIONS, et al.,** **Defendants.**	)	**Civil Action No.: 3:13-cv-678**

INTERVENOR-DEFENDANT CONGRESSMAN ROBERT HURT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

Subject to and without waiving the objections asserted in the Intervenor-Defendants Virginia Representatives' Objections and Responses To Plaintiffs' Interrogatories And Requests For Production filed on January 3, 2014, Intervenor-Defendant Congressman Robert Hurt, hereby states as follows his Answers To Plaintiffs' Interrogatories And Requests For Production.

INTERROGATORIES

INTERROGATORY NO. 1: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Congressional Redistricting. For each individual, specify the individual's

name, title, employer, last- known contact information, role in the 2012 Congressional Redistricting, and substance of the communication.

RESPONSE: I communicated with then-Delegate Bill Janis, who sponsored the redistricting bill in the General Assembly in 2011, regarding various redistricting proposals being considered by the General Assembly. Mr. Janis's last-known contact information is 2150 Plainview Business Center, Pohawtan, VA 23219.

I communicated with Delegate Rob Bell, who sponsored the redistricting bill in the General Assembly in 2012, regarding various redistricting proposals being considered by the General Assembly. Mr. Bell's last-known contact information is General Assembly Building P.O. Box 406, Richmond, VA 23218, 804-698-1058.

INTERROGATORY NO. 2: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Section 5 Submission or any part of it. For each individual, specify the individual's name, title, employer, last-known contact information, role in developing the 2012 Section 5 Submission, and substance of the communication.

RESPONSE: I did not communicate with any member or employee of the Virginia General Assembly regarding the 2012 Section 5 Submission.

INTERROGATORY NO. 3: Identify each individual, agency, company, organization, governmental body, or other entity that has or

likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting. For each individual or entity, specify the individual or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division of Legislative Services has publicly disclosed documents, materials, and maps that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting at its Redistricting website, http://redistricting.dls.virginia.gov /2010/Default.aspx.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents, materials, and/or maps.

I believe the members of the General Assembly most involved in 2012 Congressional Redistricting were Delegates Bill Janis and Rob Bell.

INTERROGATORY NO. 4: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with developing the 2012 Section 5 submission or

any part of it. For each individual or entity, specify the individual's or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division Of Legislative Services has publicly disclosed documents and other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission, as well as portions of the Section 5 submission itself, at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx. The entire 2012 Section 5 submission is available for public inspection at the Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission.

INTERROGATORY NO. 5: Identify each source of data that you used or reviewed related to the 2012 Congressional Redistricting. For each source, specify the content of the data, the source from which it came, and how it was used in the 2012 Congressional Redistricting.

RESPONSE: I reviewed data from the 2010 United States Census and election data compiled from the Virginia State Board of Elections.

Data related to the 2012 Congressional Redistricting is available at the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

INTERROGATORY NO. 6: Identify every meeting you attended related to the 2012 Congressional Redistricting process. For each meeting, specify the date, location, attendees, and subjects discussed at the meeting.

RESPONSE: I attended four meetings related to the 2012 Congressional Redistricting. On January 25, 2011, I attended a meeting at the National Republican Congressional Committee with Jerr Rosenbaum (my chief of staff at the time), Chris LaCivita, a Hurt for Congress consultant, and Randy Hinaman, a consultant. We discussed redistricting proposals being developed in the General Assembly.

On March 1, 2011, I attended a meeting with other Virginia Republican congressional representatives, their chiefs of staff, and consultants. The meeting took place at Republican National Committee offices and redistricting was discussed.

On April 7, 2011, I attended a meeting with Delegate Bill Janis and my chief of staff at the time (Jerr Rosenbaum) to discuss redistricting.

On October 5, 2011, I attended a meeting with other Virginia Republican congressional representatives, their chiefs of staff, and consultants. The meeting took place at Republican National Committee offices and redistricting was discussed.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST NO. 1: Please produce all maps and draft maps related to the 2012 Virginia Redistricting.

RESPONSE: I have no documents responsive to this request beyond what may already be available to Plaintiffs in the public record. I refer the Plaintiffs to the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

REQUEST NO. 2: Please produce all communications with the General Assembly related to the 2012 Virginia Redistricting, including without limitation all communications with General Assembly staff members, agents, employees, consultants, advisors, experts, and personnel.

RESPONSE: I have no documents responsive to this request.

REQUEST NO. 3: Please produce all communications with members of Congress related to the 2012 Virginia Redistricting, including without limitation all communications with their staff members, agents, employees, consultants, advisors, experts, and personnel.

ANSWER: I have no documents responsive to this request.

REQUEST NO. 4: Please produce all communications with the Republican National

Committee related to the 2012 Virginia Redistricting, including without limitation

* * *

[Page 7]

RULE 26(g) CERTIFICATION

I have read the foregoing Answers to Plaintiffs' Interrogatories And Requests For Production and certify that, to the best of my knowledge, information, and belief, formed after a reasonable inquiry, they comply with the requirements of Federal Rule of Civil Procedure 26(g)(l)(B).

DATED this 13th day of January, 2014.

By:_____

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DAWN CURRY PAGE, et al., **Plaintiffs** **v.** **VIRGINIA STATE BOARD OF ELECTIONS, et al.,** **Defendants.**	)	**Civil Action No.: 3:13-cv-678**

INTERVENOR-DEFENDANT CONGRESSMAN SCOTT RIGELL'S ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

Subject to and without waiving the objections asserted in the Intervenor-Defendants Virginia Representatives' Objections and Responses To Plaintiffs' Interrogatories And Requests For Production filed on January 3, 2014, Intervenor-Defendant Congressman Scott Rigell, hereby states as follows his Answers To Plaintiffs' Interrogatories And Requests For Production.

INTERROGATORIES

INTERROGATORY NO. 1: identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Congressional Redistricting. For each individual, specify the individual's name, title, employer, last- known contact

information, role in the 2012 Congressional Redistricting, and substance of the communication.

RESPONSE: Delegate Rob Bell called and then met with me to let me know that he was the point person for redistricting in the House of Delegates. Nothing substantive was discussed in the meeting. Because I had no experience with redistricting, Del. Bell focused on helping me understand the process.

I mentioned to Senator Jeff McWaters that redistricting was underway. He made a simple acknowledgement of my comment. No further discussions took place.

INTERROGATORY NO. 2: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Section 5 Submission or any part of it. For each individual, specify the individual's name, title, employer, last-known contact information, role in developing the 2012 Section 5 Submission, and substance of the communication.

RESPONSE: I did not communicate with any member or employee of the Virginia General Assembly regarding the 2012 Section 5 Submission.

INTERROGATORY NO. 3: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting. For each individual or entity, specify the individual or

entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division of Legislative Services has publicly disclosed documents, materials, and maps that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents, materials, and/or maps.

I believe the members of the General Assembly most involved in 2012 Congressional Redistricting were Delegates Bill Janis and Rob Bell.

INTERROGATORY NO. 4: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with developing the 2012 Section 5 submission or any part of it. For each individual or entity, specify the individual's or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division Of Legislative Services has publicly disclosed documents and other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission, as well as portions of the Section 5 submission itself, at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx. The entire 2012 Section 5 submission is available for public inspection at the Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786- 2071, likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission.

INTERROGATORY NO. 5: Identify each source of data that you used or reviewed related to the 2012 Congressional Redistricting. For each source, specify the content of the data, the source from which it came, and how it was used in the 2012 Congressional Redistricting.

RESPONSE: In conjunction with my consultant and personal attorney, Mr. Jason Miyares, I did review and discuss data from the 2010 United States Census and election data from the Virginia State Board of Elections. Data related to the 2012

Congressional Redistricting is available at the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

INTERROGATORY NO. 6: Identify every meeting you attended related to the 2012 Congressional Redistricting process. For each meeting, specify the date, location, attendees, and subjects discussed at the meeting.

RESPONSE: Between January 2011 and April 2012, I had several impromptu meetings with Mr. Miyares. Mr. Miyares provided me updates on the legislative status of redistricting legislation in the General Assembly. Given the brief nature of the conversations (often less than 5 minutes), and the fluidity of my meetings with Mr. Miyares, I cannot recall the date nor time of every instance that we may have discussed the status of the redistricting legislation.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST NO. 1: Please produce all maps and draft maps related to the 2012 Virginia Redistricting.

* * *

[Page 7]

RULE 26(g) CERTIFICATION

I have read the foregoing Answers to Plaintiffs' Interrogatories And Requests For Production and certify that, to the best of my knowledge, information, and belief, formed after a reasonable inquiry, they comply with the requirements of Federal Rule of Civil Procedure 26(g)(1)(B).

DATED this 13th day of January, 2014.

By:_____

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DAWN CURRY PAGE, et al., Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.	Civil Action No.: 3:13-cv-678

INTERVENOR-DEFENDANT CONGRESSMAN ROBERT J. WITTMAN'S ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

Subject to and without waiving the objections asserted in the Intervenor-Defendants Virginia Representatives' Objections and Responses To Plaintiffs' Interrogatories And Requests For Production filed on January 3, 2014, Intervenor-Defendant Congressman Robert J. Wittman, hereby states as follows his Answers To Plaintiffs' Interrogatories And Requests For Production.

INTERROGATORIES

INTERROGATORY NO. 1: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Congressional Redistricting. For each individual, specify the individual's

name, title, employer, last-known contact information, role in the 2012 Congressional Redistricting, and substance of the communication.

RESPONSE: I discussed with Speaker Bill Howell, Virginia General Assembly, (804) 698-1028, when the redistricting legislation would be enacted.

I discussed with Delegate Mark Cole, Virginia General Assembly, (804) 698-1088, when the redistricting legislation would be enacted.

INTERROGATORY NO. 2: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Section 5 Submission or any part of it. For each individual, specify the individual's name, title, employer, last- known contact information, role in developing the 2012 Section 5 Submission, and substance of the communication.

RESPONSE: I did not communicate with any member or employee of the Virginia General Assembly regarding the 2012 Section 5 Submission.

INTERROGATORY NO. 3: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting. For each individual or entity, specify the individual or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division of Legislative Services has publicly disclosed documents, materials, and maps that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents, materials, and/or maps.

I believe the members of the General Assembly most involved in 2012 Congressional Redistricting were Delegates Bill Janis and Rob Bell.

INTERROGATORY NO. 4: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with developing the 2012 Section 5 submission or any part of it. For each individual or entity, specify the individual's or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to

draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division Of Legislative Services has publicly disclosed documents and other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission, as well as portions of the Section 5 submission itself, at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx. The entire 2012 Section 5 submission is available for public inspection at the Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission.

INTERROGATORY NO. 5: Identify each source of data that you used or reviewed related to the 2012 Congressional Redistricting. For each source, specify the content of the data, the source from which it came, and how it was used in the 2012 Congressional Redistricting.

RESPONSE: I did not review data from the 2012 Congressional Redistricting.

Data related to the 2012 Congressional Redistricting is available at the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

INTERROGATORY NO. 6: Identify every meeting you attended related to the 2012

Congressional Redistricting process. For each meeting, specify the date, location, attendees, and subjects discussed at the meeting.

RESPONSE: I attended a meeting at the National Republican Congressional Committee with other Republican Members of Congress from Virginia and some chiefs of staff. We discussed redistricting.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST NO. 1: Please produce all maps and draft maps related to the 2012 Virginia Redistricting.

RESPONSE: I have no documents responsive to this request beyond what may already be available to Plaintiffs in the public record. I refer the Plaintiffs to the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

REQUEST NO. 2: Please produce all communications with the General Assembly related to the 2012 Virginia Redistricting, including without limitation all communications with General Assembly staff members, agents, employees, consultants, advisors, experts,

* * *

[Page 6]

RULE 26(g) CERTIFICATION

I have read the foregoing Answers to Plaintiffs' Interrogatories And Requests For Production and certify that, to the best of my knowledge, information, and belief, formed after a reasonable inquiry, they

comply with the requirements of Federal Rule of Civil Procedure 26(g)(1)(B).

DATED this 13th day of January, 2014.

By: /s/ Robert J. Wittman

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DAWN CURRY PAGE, et al., Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.	Civil Action No.: 3:13-cv-678

INTERVENOR-DEFENDANT CONGRESSMAN FRANK WOLF'S ANSWERS TO PLAINTIFFS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

Subject to and without waiving the objections asserted in the Intervenor-Defendants Virginia Representatives' Objections and Responses To Plaintiffs' Interrogatories And Requests For Production filed on January 3, 2014, Intervenor-Defendant Congressman Frank Wolf, hereby states as follows his Answers To Plaintiffs' Interrogatories And Requests For Production.

INTERROGATORIES

INTERROGATORY NO. 1: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Congressional Redistricting. For each individual, specify the individual's

name, title, employer, last-known contact information, role in the 2012 Congressional Redistricting, and substance of the communication.

RESPONSE:

I do not recall communicating with any member or employee of the Virginia General Assembly regarding the 2012 Congressional Redistricting.

INTERROGATORY NO. 2: Identify every member or employee of the Virginia General Assembly with whom you communicated regarding the 2012 Section 5 Submission or any part of it. For each individual, specify the individual's name, title, employer, last- known contact information, role in developing the 2012 Section 5 Submission, and substance of the communication.

RESPONSE: I do not recall communicating with any member or employee of the Virginia General Assembly regarding the 2012 Section 5 Submission.

INTERROGATORY NO. 3: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting. For each individual or entity, specify the individual or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not know what materials were used, considered, consulted or created that relate to

efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting nor whether any such materials remain in the possession of whomever used or created such documents. The Division of Legislative Services has publicly disclosed documents, materials, and maps that were used, considered, consulted, or created in connection with the 2012 Congressional Redistricting at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents, materials, and/or maps.

I believe the members of the General Assembly most involved in 2012 Congressional Redistricting were Delegates Bill Janis and Rob Bell.

INTERROGATORY NO. 4: Identify each individual, agency, company, organization, governmental body, or other entity that has or likely has possession of documents or other materials that were used, considered, consulted, or created in connection with developing the 2012 Section 5 submission or any part of it. For each individual or entity, specify the individual's or entity's name, last-known contact information, and the categories of documents or materials within his/her/its possession.

RESPONSE: I do not recall what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Section 5 Submission nor whether any such materials remain in the possession

of whomever used or created such documents. The Division Of Legislative Services has publicly disclosed documents and other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission, as well as portions of the Section 5 submission itself, at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx. The entire 2012 Section 5 submission is available for public inspection at the Division of Legislative Services, General Assembly Building, 910 Capitol Street, Richmond, Virginia.

The Office of Attorney General, 900 East Main Street, Richmond, VA 23219, 804-786-2071, likely has possession of documents or other materials that were used, considered, consulted, or created in connection with the 2012 Section 5 submission.

INTERROGATORY NO. 5: Identify each source of data that you used or reviewed related to the 2012 Congressional Redistricting. For each source, specify the content of the data, the source from which it came, and how it was used in the 2012 Congressional Redistricting.

RESPONSE: I reviewed data generated by the Division of Legislative Services. The Division of Legislative Services has made all of its data public available at its Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx

INTERROGATORY NO. 6: Identify every meeting you attended related to the 2012 Congressional Redistricting process. For each meeting, specify the date, location, attendees, and subjects discussed at the meeting.

RESPONSE: I attended a meeting at the National Republican Congressional Committee with other Republican Members of Congress from Virginia and some chiefs of staff. We discussed redistricting.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST NO. 1: Please produce all maps and draft maps related to the 2012 Virginia Redistricting.

RESPONSE: I have no documents responsive to this request beyond what may already be available to Plaintiffs in the public record. I refer the Plaintiffs to the Division of Legislative Services' Redistricting website, http://redistricting.dls.virginia.gov/2010/Default.aspx.

REQUEST NO. 2: Please produce all communications with the General Assembly related to the 2012 Virginia Redistricting, including without limitation all communications with General Assembly staff members, agents, employees, consultants, advisors, experts and personnel.

RESPONSE: I have no documents responsive to this request.

* * *

[Page 6]

RULE 26(g) CERTIFICATION

I have read the foregoing Answers to Plaintiffs' Interrogatories And Requests For Production and certify that, to the best of my knowledge, information, and belief, formed after a reasonable inquiry, they

comply with the requirements of Federal Rule of Civil Procedure 26(g)(1)(B).

DATED this 13th day of January, 2014.

By: /s/ Frank Wolf

No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants.

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court for the Eastern District of Virginia

JOINT APPENDIX (VOLUME II OF III)

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TABLE OF CONTENTS

Page

VOLUME II

Virginia Regular Session. Transcript of HB 5004 Floor Session Proceedings (April 12, 2011) (Plaintiffs' Trial Exhibit 43) 350

Virginia Regular Session. Transcript of Proceedings (June 9, 2011) (Plaintiffs' Trial Exhibit 45) 393

Virginia Regular Session. Transcript of Proceedings (January 20, 2012) (Plaintiffs' Trial Exhibit 47) (Excerpts) 402

Enacted Congressional District 3 Maps (Plaintiffs' Trial Exhibit 48) 413

Plaintiffs' Alternative Congressional District 3 Maps (Plaintiffs' Trial Exhibit 49) 424

Population Changes in CD3 1991-2012 (Plaintiffs' Trial Exhibit 50) 427

Opening Statement of the Honorable Mark L. Cole, Subcommittee Public Hearing House P&E Subcommittee on Redistricting (September 8, 2010) (Plaintiffs' Trial Exhibit 52) (Excerpts) 428

Emails between Chris Marston and Glenn Odor (May 31-June 1, 2011) (Plaintiffs' Trial Exhibit 53) 430

Precinct Data from Norfolk, Petersburg, and Portsmouth Counties (Plaintiffs' Trial Exhibit 56) 433

Enacted Plan, Mr. Morgan's Original Table and Corrected Table (Plaintiffs' Trial Exhibit 57) 438

Enacted Plan Map (Intervenor-Defendants' Trial Exhibit 2) 442

HB 251 (2012) Enacted District 3 Map (Intervenor-Defendants' Trial Exhibit 3) 443

Benchmark District 3 Map (Intervenor-Defendants' Trial Exhibit 6) 444

1998 District 3 Map (Intervenor-Defendants' Trial Exhibit 7) 445

In the Matter of the Committee on Privileges and Elections, Notice of Public Meeting for House Bill No. 5004, Amendment in the Nature of a Substitute (April 12, 2011) (Intervenor-Defendants' Trial Exhibit 9) (Excerpts) 446

Plaintiffs' Notice of Filing of Alternative Congressional Redistricting Plan (February 4, 2014) (Intervenor-Defendants' Trial Exhibit 10) 465

Report of John B. Morgan Regarding Plaintiffs' Alternative Plan and the Enacted Plan (March 14, 2014) (Intervenor-Defendants' Trial Exhibit 13) 473

Table 7 Benchmark and Enacted Districts with 2008, 2012 Presidential Data (Intervenor-Defendants' Trial Exhibit 20) 521

Table 8 Population Movement Between Benchmark and Enacted Districts with 2008, 2012 Presidential Data (Intervenor-Defendants' Trial Exhibit 21) 523

Table 9 Benchmark and Alternative Districts with 2008, 2012 Presidential Data (Intervenor-Defendants' Trial Exhibit 22) 524

Table 14 Preservation of Cores of the Benchmark Districts (Intervenor-Defendants' Trial Exhibit 27) 525

Privileges and Elections Redistricting Senate Hearing (April 4, 2011) (Intervenor-Defendants' Trial Exhibit 30) (Excerpts) 526

Privileges and Elections Redistricting Senate Hearing (April 7, 2011) (Intervenor-Defendants' Trial Exhibit 32) (Excerpts).....529

Letter of Virginia Attorney General to Chris Herren, Chief of Voting Section for the Department of Justice (May 10, 2011) (Intervenor-Defendants' Trial Exhibit 34) (Excerpts) 538

Michael P. McDonald Email (March 23, 2011) (Intervenor-Defendants' Trial Exhibit 45) 542

Original VTDs Chart (Intervenor-Defendants' Trial Exhibit 50) 543

Corrected VTDs Chart (Intervenor-Defendants' Trial Exhibit 50) 545

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470-7473 (Feb. 9, 2011) (Defendants' Trial Exhibit 9) 547

State of Virginia Regular Session

HB 5004 Floor Session Footage

April 12, 2011

Verbatim Transcript of Proceedings

Transcribed from Audio/Video Recording

THE CLERK: Mr. Speaker, calendar of the House of Delegates 2011, Special Session 1, for Tuesday, April 12, 2011. House bill on second reading, regular calendar.

House Bill 5004, a bill to amend the code of Virginia and to repeal Section 24.2-302.1 of the code of Virginia related to congressional districts. Report for personal elections April 11 with an amendment.

And, Mr. Speaker, there are floor amendments.

MR. SPEAKER: The gentleman from Henrico, Mr. Janis.

MR. JANIS: Thank you, Mr. Speaker. I move the House adopt the committee amendment.

MR. SPEAKER: The questions on adoption of the committee amendment. As many as favor that motion will say aye.

RESPONSE: Aye.

MR. SPEAKER: Those opposed, no.

Committee amendment is agreed to. Gentleman from Henrico.

MR. JANIS: Thank you, Mr. Speaker.

Mr. Speaker, members of the House, House Bill 5004 is a bill to redraw the boundary lines of the 11 Virginia congressional districts pursuant to the mandate of the United States Constitution and the

constitution of the commonwealth of Virginia that every ten years we reapportion these districts.

The congressional district boundary lines reflected in House Bill 5004 were drawn based on several criteria.

First, and most importantly, the districts that were drawn to 3rd Congressional District conform to the mandates of the United States Constitution and the Constitution of Virginia, and specifically to comply with the one-person-one- vote rule, which occurs in both of these constitutional documents.

This was a significant change and a significant challenge, given the dramatic and nonuniform shifts in population in the commonwealth over the last ten years, and specifically the dramatic population growth in northern Virginia compared to population loss in certain parts of the south side of the southwest and slower population growth in other parts of the commonwealth.

The second criteria that's applied in House Bill 5004 is that the districts were drawn to conform with all mandates of federal law, and, most notably, the Voting Rights Act. The Voting Rights Act mandates that there be no retrogression in minority voter influence in the 3rd Congressional District, and House Bill 5004 accomplishes that.

The federal law also applies what's called a zero-variance rule. And what zero-variance rule means is that each of the 11 congressional districts must be drawn in such a way as to encompass a territory where there are no fewer than 727,365 residents but no more than 727,366 residents. There can be no more than a one-person variation between each of the

congressional districts. House Bill 5004 complies with this.

Third, the districts were drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections. And these districts are based on the core of the existing congressional districts with the minimal amount of change or disruption to the current boundary lines, consistent with the need to expand or contract the territory of each district to reflect the results of the 2010 census and to ensure that each district had the right 727,365 benchmark.

House Bill 5004 respects the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together. And it attempts to do this while still making sure that we comply with the constitutional mandate and the federal law mandates.

Wherever possible, we also attempt to keep together jurisdictions and localities, counties, cities, and towns. We try to either keep them intact or, in some cases, reunite counties, cities, or towns that were splintered in previous redistricting plans.

In fact, House Bill 5004 splits fewer jurisdictions than the current congressional district lines. You'll notice in the plan that three counties: the county of Allegheny, the county of Brunswick, and the county of Caroline are reunited into single congressional districts under this plan. One city, the city of Covington, is also reunited under this plan.

Wherever possible, the plan also seeks to preserve existing local communities of interest, and, in some

cases, to reunite such communities that may have been fractured in the course of previous reapportionment plans, most notably, Reston in northern Virginia.

The district boundary lines were drawn based in part on specific and detailed recommendations that were provided by each of the 11 current members of the United States Congress in the Virginia delegation. Both Republican and Democrat members provided specific detailed and significant input in recommendations to how best to draw the lines for their districts.

The boundaries of the current districts seek to preserve local communities of interest based on these recommendations and given the need to expand or contract the districts to meet the 727,365 person benchmark population.

I have personally spoken with each member of the Virginia congressional delegation, both Republican and Democrat, and they have each confirmed for me and assured me that the lines for their congressional district as they appear in this legislation conform to the recommendations that they provided. And they have each confirmed for me that they support the lines of their congressional district as it is drawn in House Bill 5004.

And, accordingly, that's why we drew the lines this way was to, to the greatest degree possible, conform with the United States Constitution and federal law and pursuant to the significant population shifts over the last ten years, to respect the core of the existing congressional district boundaries with the least amount of disruption in the continuity of

representation on the part of the constituents of these districts.

Prior to answering any questions that the members may have, I do have a technical amendment, and at the appropriate time, I'd like to offer the technical amendment to correct the problem with one of the precincts. I can speak to the amendment when that's at the appropriate time, Mr. Speaker.

MR. SPEAKER: Clerk will record a floor amendment.

THE CLERK: Yes, Mr. Speaker, floor amendments to House Bill 5004 offered by Delegate Janis. Mr. Speaker, there are three.

Amendment 1, line 66, after "precincts," strike the remainder of line 66 and through "precinct" on line 67.

Amendment 2, line 93, after 302 insert "Taylor Elementary School 213."

And third amendment, Mr. Speaker, line 94, after "precincts," strike the remainder of line 94 and through "precinct" on line 95.

MR. SPEAKER: Gentleman from Henrico.

MR. JANIS: Thank you, Mr. Speaker, members of the House.

This amendment is necessary — and I thank the gentleman from Norfolk, Mr. Alexander, for pointing this out during testimony in the Privilege and Elections Committee yesterday — Taylor Elementary School is a precinct that was bordering the 3rd and 2nd congressional districts.

And the Census Bureau, when they did the census blocks, inadvertently placed the population that was

on board the Norfolk operations base in Norfolk, Virginia, inadvertently the Census Bureau put that population into the Taylor Elementary School precinct rather than into Zion Grace, which would have been the appropriate precinct in Norfolk.

As a result, in order to meet the 727,365 benchmark, we ended up splitting Taylor Elementary School precinct with 4,000 folks in that precinct being in the 3rd Congressional District and 73 folks being in the 2nd Congressional District. And this was going to be a significant cost impact and was going to split a local community of interest.

I thank the gentleman from Norfolk, Mr. Alexander, for pointing this out to us.

And so what this amendment does is it corrects the problem by placing Taylor Elementary School entirely in the 3rd Congressional District and splitting a census block that will not require the splitting of a precinct in another precinct in the 3rd Congressional District.

And so I hope it will be the pleasure of the House to accept Amendments 1, 2, and 3. I think we probably ought to take them up in a block, Mr. Speaker. I would hope to take them up in a block, because the amendments actually will work some problems if we don't adopt all three. So there shouldn't be any reason why they should be severed, and I would move that they be adopted in a block.

MR. SPEAKER: Questions on adoption of floor amendments offered by the gentleman from Henrico, Mr. Janis. As many as favor the adoption of the floor amendments will say aye.

RESPONSE: Aye.

MR. SPEAKER: Those opposed, no.

Floor amendments agreed to.

MR. JANIS: Thank you, Mr. Speaker. I move that the House pass House Bill 5004 under its third reading.

MR. SPEAKER: Gentleman from Henry, Mr. Armstrong?

MR. ARMSTRONG: Mr. Speaker, would the gentleman from Henrico, Mr. Janis, yield for a question?

MR. SPEAKER: Gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: I would ask the gentleman, was he requested by the leadership of the majority party of the House of Delegates to be the chief patron of a bill dealing with congressional reapportionment?

MR. JANIS: I would say to the gentleman that I introduced the bill as the chief patron after consultation with the Speaker and other members of my caucus.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: I would ask the gentleman, did he have access to the Division of Legislative Services in the preparation of the bill, House Bill 5004?

MR. JANIS: I would say that the Division of Legislative Services provided support to the drafting of this legislation.

MR. ARMSTRONG: Further question, Mr. Speaker.

MR. SPEAKER: Gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Can the gentleman tell me what voting performance analysis that he conducted of the various congressional districts, particularly with regard to minority participation in the development of House Bill 5004.

MR. JANIS: I would say to the gentleman that one the paramount concerns in the drafting of the bill was the constitutional and federal law mandate under the Voting Rights Act that we not retrogress minority voting influence in the 3rd Congressional District.

And so we looked at the census data as to the current percentage of voting age African-American population in the 3rd Congressional District and what that percentage would be in the proposed lines to ensure that the new lines that were drawn for the 3rd Congressional District would not retrogress in the sense that they would not have less percentage of voting age African-American population under the proposed lines in 5004 than exist under the current lines under the current congressional district.

MR. ARMSTRONG: Would the gentleman yield for an additional question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Can the gentleman tell me then what effective minority voting participation percentage is found in the 3rd Congressional District since this analysis was done?

MR. JANIS: I've got the number here, and I've got a — if the gentleman will indulge me for a moment, I'll find the number, the percentage.

I would say to the gentleman that, based on the information from the Census Bureau as a result of the 2010 census, under the current lines, boundary lines, for the 3rd Congressional District, there are 52.62 percent voting age population that is African-American under the current lines of the 3rd Congressional District. Under the lines that are proposed in House Bill 5004, the voting age population African-American for the 3rd Congressional District would be 55.9 percent.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Would the gentleman agree with me that the current case law that is available in interpreting the Voting Rights Act indicates that it is necessary to conduct an analysis of more than just the percentage of minority representation. That in order to determine whether or not the minority population in a given district is able to elect its

candidate of choice, that an analysis of the historic voting patterns of that minority be conducted?

MR. JANIS: I would say to the gentleman that I've been advised by lawyers who practice election law — that is not an area of the law that I practice — and also been consulting with lawyers who have looked at the lines as they are drawn in this plan, and they believe that these lines as they are drawn are constitutionally permissible and comply with all federal mandates under existing federal law and are defensible either through the Justice Department review or through any litigation that might result. That these lines are constitutionally permissible and conform to all mandates of federal law.

MR. ARMSTRONG: Would the gentleman yield for an additional question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: While I appreciate the gentleman's opinion that the plan complies with the Voting Rights Act, my question is whether or not an analysis was done to determine whether or not the minority population of the 3rd Congressional District, or what percentage it would take for that minority population to elect its candidate of choice. It is, was an analysis of that particular voting district and others conducted by him or others in the majority party in the development of House Bill 5004?

MR. JANIS: And I would say to the gentleman that the lines for House Bill 5004 were the product of recommendations received from all 11 congressmen,

including Congressman Scott in the 3rd Congressional District and based on the census data that came from the Census Bureau and took into consideration very specifically the Census Bureau data about the — which indicates the current percentage of voting age population of African-Americans within 3rd Congressional District lines and also took as part of the analysis what the voting age population of African-Americans would be under the proposed lines.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: What I did not hear is that an analysis of the means that I suggested was conducted. Would the gentleman agree with me that that analysis was not done?

MR. JANIS: I would say to the gentleman that I described the method that we used in the analysis the we did of the data that we received from the Census Bureau and that it was — we took into account population shifts, which required the 3rd Congressional District to gain in population by approximately 63,975 residents in order to meet the 727,365 ideal congressional district benchmark. And also took into consideration the population data from the Census Bureau, specifically the population data involving voting age African-American population.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Can the gentleman identify who he was referring to when he used the pronoun "we"?

MR. JANIS: What I will say is this is my legislation. I looked at this legislation. I looked at the data. We looked at the recommendations of the congressional district. We tried to reconcile sometimes competing recommendations from various congressional members. We looked at the data from the Census Bureau.

We were very — I was most especially focused on making sure that the 3rd Congressional District did not retrogress in its minority voting influence. These lines as they appear in 5004, in my opinion, meet the criteria that's mandated by the Justice Department.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: I would ask the gentleman — I would first — the type of analysis that I've described in my previous several questions, I would — I think I previously used the term "retrogression analysis," and I'm going to ask the gentleman to assume that that's what I mean when I say an analysis to determine whether or not a minority population in a given district is able to elect its candidate of choice.

Having defined the term, I would ask the gentleman whether anyone outside of the Division of Legislative Services conducted such retrogression analysis in the preparation of House Bill 5004.

MR. JANIS: I'm not aware of anyone outside of legislative services that conducted any analysis.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: I would ask the gentleman whether the Division of Legislative Services conducted the type of retrogression analysis that I've described?

MR. JANIS: I would say to the gentleman that the lines are drawn based on the Census Bureau data, which provides what the voting age African-American population under the current district boundaries would be, which is 52.62 percent based on the 2010 census.

And it indicates — this data indicates that under the proposed lines, that the voting age African-American population in the 3rd Congressional District would be 55.9 percent. This represents a 3.28 percent difference.

And that — based on my understanding of what federal law requires under the Voting Rights Act, that this does not retrogress the district and therefore is acceptable under the Voting Rights Act and complies with the mandate of both the Voting Rights Act and all the constitutional case law

regarding what the mandate would be to ensure that there be no retrogression in minority voter influence in the 3rd Congressional District.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: The gentleman has already enunciated that he believes that the Voting Rights Act would – has jurisdiction over the reapportioning of congressional district lines; is that correct?

MR. JANIS: That's correct.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Would the gentleman also agree that under Article 1, Section 2 of the United States Constitution and various other relevant case law, including Cartro (phonetic) versus Daggett that the gentleman has described that essentially we have virtually a 0 percent deviation, or I think a one-person deviation in each of the congressional districts; is that correct?

MR. JANIS: And I would say to the gentleman, I'm familiar with Cartro v. Daggett, which is the Supreme Court case that requires us to do one-person-one-vote and Bossier Parish v. United States, which interprets that to mean that there can be a one

person deviation from one district to the next. Meaning that each one of these districts must be drawn based on the census data from 2010 with no fewer of 727,365 residents and no more than 727,366 residents.

MR. ARMSTRONG: Would the gentleman yield for an additional question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: I would ask the gentleman that besides the Voting Rights Act and the one-person-one-vote criteria he has just enunciated, can the gentleman explain to me what other criteria were used — and I would preface my question by saying that in the preparation of the House redistricting plan, there was criteria developed by the House P&E committee that were similar criteria developed above and beyond the Voting Rights Act and the one-person-one-vote rule established in Karcher.

MR. JANIS: And I would say to the gentleman that the criteria we tried to apply were in part — some of the criteria were mandatory — most of the criteria were mandatory. Some of the criteria were permissive.

The first criteria that we applied was, it had to comply with all mandates of the United States Constitution and the Constitution of Virginia, most especially it must comply with the one-person-one-vote rule as interpreted by appropriate case law. Karcher v. Daggett, Bossier Parish, and so forth.

Second, that it was drawn to conform with all mandates of federal law, and most notably the Voting Rights Act and most specifically, that it follow a zero-variance rule, which is the 727,365 rule, and also that there be no retrogression in the minority voter influence in the 3rd Congressional District.

Those are the mandatory criteria that are not permissive, that there is no discretion in the application of those.

Then, consistent with those criteria and the 2010 census data that mandated significant shifts in population between the various congressional districts, the third criteria that we tried to apply was, to the greatest degree possible, we tried to respect the will of the Virginia electorate as it was expressed in the November 2010 congressional elections.

And what that meant was we based the territory of each of these districts on the core of the existing congressional districts. We attempted — I attempted to not disrupt those lines, to the minimum degree possible, consistent with the need to either expand or contract the territory of these districts.

We respected the will of the electorate by not placing — one of the criteria was not placing two congressmen in a district together. And one of the criteria was that we would not take the district lines and draw a congressman out of his existing district.

The last criteria that we applied that was permissive was, to the greatest degree possible, consistent with the constitutional mandates, the federal law mandates, and the population shifts, we attempted to the greatest degree wherever possible not to split counties, cities, and towns, local

jurisdictions, and to reunite wherever possible jurisdictions such as Allegheny County, Brunswick County, Caroline County, and the city of Covington.

And then we also tried not to split local communities of interest based on the recommendations we received from the current members of the congressional delegation.

MR. ARMSTRONG: Further question, Mr. Speaker.

MR. SPEAKER: Gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Regarding the splitting of jurisdictions, the gentleman was not particularly successful with Henry County in the 5th Congressional — 9th Congressional District, was he?

MR. JANIS: I would say to the gentleman that the plan as it appears, the lines as they appear in House Bill 5004 split fewer jurisdictions than the current congressional lines do.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Once again, the gentleman referred to the pronoun "we" in terms of the development of permissive criteria. Can the gentleman identify who "we" is in the development of the permissive criteria that he just enunciated?

MR. JANIS: We is me.

MR. SPEAKER: It's the royal we.

MR. JANIS: I'll try to use — I'll be first person singular, if that removes any confusion, Mr. Speaker.

MR. ARMSTRONG: Would the gentleman yield for an additional question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Did the gentleman ever write down the permissive criteria that he utilized in the development of House Bill 5004?

MR. JANIS: I have them written down right here in my opening remarks.

MR. ARMSTRONG: Further question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Did anyone besides the gentleman develop the permissive criteria that he enunciated in the development of HB 5004?

MR. JANIS: I would say to the gentleman that the only person's name who appears on this legislation is mine, and this is my legislation. I introduced it. It's my bill.

MR. ARMSTRONG: Further question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: I think the question was did anyone assist the gentleman as the member of this body in the development of permissive criteria?

MR. JANIS: I would say to the gentleman that the criteria that I applied were based on what the law mandates, either the constitutional or federal law, which are not permissive — which we're not free to dispense with.

And then the permissive criteria was based on recommendations received from each of the 11 currently elected congressmen, both Republican and Democrat, about how best to preserve local communities of interest, local jurisdictions, given their knowledge of their districts. And that each member of the congressional delegation, both Republican and Democrat, had significant specific and detailed input in recommendations as to how the lines of their own district was drawn.

And then it was simply a matter of trying to reconcile what were sometimes competing recommendations or competing claims on certain parts of the state.

MR. ARMSTRONG: Would the gentleman yield for an additional question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: I would ask the gentleman, did any consideration play into his drafting of HB 5004 in the creation of a minority influence district?

MR. JANIS: I would say to the gentleman that the criteria that I applied was that the Voting Rights Act

mandates, that there be no retrogression in minority voting influence in the 3rd Congressional District, which is the only majority minority district in Virginia.

So what this bill attempts to do, and what this plan and what the lines in this plan do, is they comply with both the United States Constitution and the Constitution of Virginia and the Voting Rights Act as well as the zero variance rule, which is required under federal case law in this matter, to ensure that the 3rd Congressional District did not retrogress in its minority voting influence.

MR. ARMSTRONG: Further question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: So the answer to my question is no.

MR. JANIS: I think I've answered the gentleman's question. What we tried to do is not retrogress the 3rd Congressional District.

MR. ARMSTRONG: Would the gentleman yield for an additional question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: The gentleman is certainly entitled not to answer my question if he so chooses, but my question was, was any consideration given to the creation of a minority influence district?

I'm extremely aware, because the gentleman has repeated it about six times, regarding the retrogression analysis for the 3rd Congressional District. I'm asking the gentleman whether or not any consideration whatsoever was given to the creation of a minority influence district?

MR. JANIS: And I've answered the gentleman now seven times that the methodology that we used, the methodology that I used in drawing these lines was that I focused on the 3rd Congressional District and ensuring, based on recommendations that I received from Congressman Scott and from all 11 members of the congressional delegation, Republican and Democrat — one of the paramount concerns and considerations that was not permissive and nonnegotiable under federal law and under constitutional precedent is that the 3rd Congressional District not retrogress in minority voter influence.

And that's how the lines were drawn, and that was the primary focus of how the lines in House Bill 5004 were drawn was to ensure that there be no retrogression in the 3rd Congressional District. Because if that occurred, the plan would be unlikely to survive a challenge either through the Justice Department or the courts because it would not comply with the constitutionally mandated requirement that there be no retrogression in the minority voting influence in the 3rd Congressional District.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Could the gentleman explain to me and to the body why it was of any significance whatsoever to contact incumbent members of the U.S. Congress and to gather their opinion on where the lines should be drawn? Why is that relevant?

MR. JANIS: I would say to the gentleman that it was — I didn't believe that it was the — that the purpose of this legislation should be to overturn the will of the electorate as it was expressed in 2010.

And you've got members of the current congressional delegation that have served for one year, and you've got members of the delegation that have served for 20 years, and everything in between. And when looking for input as to how to best preserve local communities of interest — local jurisdictions and localities are easy to see because they're on a map, but local communities of interest are not readily self- evident on a map — that it was relevant and it was reasonable to seek input and recommendations from those current congressmen because not only do they know the local communities of interest, but the local communities of interest know them and have elected them to public office.

And, therefore, it was reasonable and, in fact, seemed quite necessary to seek recommendations and input from the current congressional delegation, both Republican and Democrat.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Would the gentleman then admit that incumbency protection was one of the permissive criteria that he utilized in the development of HB 5004?

MR. JANIS: Well, I would say that, as one member of the congressional delegation said, incumbency protection is how this has been described in every single newspaper report and every account in every newspaper was that this is an incumbency protection program.

But, once again, I would say to the gentleman, there's not a single member of the United States congressional delegation that serves in the House of Delegates, there's not one of them that's going to get a vote on this plan today. This legislation was introduced by me. I'm the chief patron of the bill. And it will be up to the hundred members of this house to decide whether we pass this legislation or not.

And that's — the gentleman is free to characterize the plan however he wants to, but it did not seem unreasonable, and, in fact, it seemed rather necessary to seek the input of the existing congressional delegation, both Republican and Democrat, in a bipartisan manner to try and determine how we could best reconcile what our competing interests and try to best draw these lines to ensure continuity of representation, continuity of constituent service.

And it was — I just didn't think that it was the place of the House of Delegates to thwart the will of

the electorate as it was expressed last year by disrupting the current congressional boundaries. And what we tried to do was maintain the core of what those boundaries were under the existing lines.

MR. ARMSTRONG: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: I would ask the gentleman, did the gentleman share with the members of the — the 11 members of the Virginia congressional delegation the lines that ended up being in HB 5004, excluding perhaps for the floor amendments that were offered by the gentleman just a few moments ago?

MR. JANIS: I would say to the gentleman that I met last Thursday with — once the lines were finalized, I met last Thursday with each member of the Virginia congressional delegation, both Republican and Democrat to confirm that they had — and to afford them an opportunity to look at the legislation and look at a map as it's drawn in the legislation and to get the assurance of each member of the delegation, Republican and Democrat, that the lines for their congressional district as it appears in House Bill 5004 conform to the recommendations that they provided.

And also furthermore to obtain assurance that each member, Republican and Democrat, supports the lines as they're drawn for their district in House Bill 5004.

MR. ARMSTRONG: Further question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. ARMSTRONG: Would the gentleman then represent to us that there was concurrence by each member of the — or each of the 11 members of the Virginia congressional delegation with the plan as per their own particular district?

MR. JANIS: And I would say to the gentleman with — the precise question is put precisely, and the answer is precisely yes. That — I didn't — not a single member gave me an opinion about the plan in its totality.

What the members provided me was confirmation that the lines as they are drawn pertaining to the member's individual district conform to the member's recommendation. And that the member supported the lines in this plan as they were drawn for their specific district.

And I didn't solicit, nor was I given, an opinion about the plan as a whole by any member of the congressional delegation but simply sought to get their input as to whether or not these lines, as they were drawn for their specific district, were acceptable.

MR. ARMSTRONG: I thank the gentleman for yielding to my questions, Mr. Speaker.

MR. SPEAKER: Gentleman from Henrico and Mr. Morrissey?

MR. MORRISSEY: Thank you, Mr. Speaker. Would the gentleman from Henrico yield for a question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: I'll preface my question with the comment that I don't want the gentleman to get angry when I request specificity, but in the interest of brevity, if we could perhaps answer questions with one or two words if it's at all possible.

Under the gentleman's House Plan 5004, would the gentleman tell the body how many congressional districts are majority minority districts, of the 11.

MR. JANIS: One.

MR. MORRISSEY: Thank you. Would the gentleman yield for another question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: Since Virginia has a black population of approximately 22 percent, does the gentleman think it's appropriate and fair and complying with the Voting Rights Act that only 9 percent of the congressional representation is by an African-American if 22 percent of the population is African-American?

MR. JANIS: I would say to the gentleman that I'm quite confident that the lines for each congressional district as they are drawn in House Bill 5004 comply

with the mandates of the Voting Rights Act and are constitutionally permissible.

MR. MORRISSEY: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: I would say to the gentleman, but that wasn't my question. I asked if he thought it was fair and appropriate and complied with the Voting Rights Act that 9 percent of our congressional representation is black but 22 percent of our population is black?

MR. JANIS: And I would say to the gentleman that the lines for each of these congressional districts are drawn in such a way that they comply with all mandates of the United States Constitution, the Constitution of Virginia, and they comply with the specific mandates of the Voting Rights Act.

MR. MORRISSEY: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: Is it true that under House Plan 5004 there are no minority-influenced districts under the plan that you authored?

MR. JANIS: I would say to the gentleman, I'm not sure how he defines minority-influenced districts. And the case law in this is all — is pretty clear, but what I would say to the gentleman once again is

there is a single majority minority district that is the 3rd Congressional District. This district was a majority minority district under the lines as currently drawn in 2001.

And the Voting Rights Act is very clear that we are required not to retrogress minority voter influence in that congressional district.

MR. MORRISSEY: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: The gentleman listed a litany of Supreme Court cases on voting — on redistricting, and in those cases, the words "minority influenced" is used throughout. So I would use it in the same context and ask the gentleman in his plan that he authored, are there any minority-influenced districts that are African-American other than what we already know, there being one majority minority district?

MR. JANIS: And I would say to the gentleman, the case law is pretty clear, if he reads Reno v. Bossier Parish, School Board, Bossier 2, he's got the answer to his question right there.

MR. MORRISSEY: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: Are there any Latino-influenced districts in the gentleman's plan? Given the large Latino population in the commonwealth.

MR. JANIS: I would say to the gentleman there's only one constitutionally mandated minority majority district in this plan. It is the 3rd Congressional District, and it complies with all requirements of the Voting Rights Act and the United States Constitution and the Constitution of Virginia.

MR. MORRISSEY: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: Given that there is only one majority minority district, there is no minority-influenced district with respect to the Latino population, the African-American population, the Asian population, does the gentleman really think that that complies with the Voting Rights Act, the inherent mandate of the Voting Rights Act?

MR. JANIS: Well, I'm not sure what the inherent mandate of the Voting Rights Act is, but I will tell the gentleman that what the explicit mandate of the Voting Rights Act is, is that the minority voter influence in majority minority districts such as the 3rd Congressional District, which is the only majority minority district under current congressional lines and under the proposed congressional plan, that there's no inherent mandate in the Voting Rights Act.

There's an explicit mandate in the Voting Rights Act that the 3rd Congressional District — that

minority voting influence in the 3rd Congressional District must not be retrogressed. And I am quite confident that the lines as they're drawn in this House Bill 5004 comply with the mandate of the Voting Rights Act and comply with all mandates of the United States Constitution, the Virginia Constitution, and the Voting Rights Act.

MR. MORRISSEY: Would the gentleman yield for an additional question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: The gentleman indicated that he spoke to all of our 11 congressmen. Did the gentleman hold any town hall meetings or forums or events for the public to comment? And, if so, are there any memorializations of those meetings vis-à-vis court reporting, reporters, transcripts?

MR. JANIS: I would say to the gentleman — I would remind the gentleman that there were a series of public meetings both last year and this year where the public was given notice and an opportunity to be heard on all congressional redistricting — on the congressional redistricting plan, the Virginia Senate redistricting plan, and the House of Delegates redistricting plan. And that comment was taken in each of these public meetings.

And in some cases there was actually members of the public that commented about the congressional lines, and in some places they commented on the senate and the House of Delegates lines. But that these meetings not only were public meetings where

the public was given a notice and opportunity to be heard on the general assemblies redistricting plan but also were advertised and published as meetings where the public could also provide input on the congressional redistricting.

MR. MORRISSEY: Mr. Speaker, would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: Again, the gentleman didn't answer my question. I asked the gentleman, since he has stated that he is the author of this HB 5004 and not the regal "we," I asked the gentleman, did he hold any public meetings that were memorialized with a transcript with respect to this congressional district?

MR. JANIS: And I understand, Mr. Speaker, that the gentleman wants to answer my questions and ask his questions, but I will say to the gentleman, we had public meetings. The general assembly advertised that there would be public meetings both last year and this year where the public was given notice and an opportunity to be heard on each of the redistricting plans, including the congressional redistricting.

And I'm going to continue to give the gentleman that same answer. I know he's frustrated because he can't both ask and answer the questions, but that's the answer I'm going to continue to give the gentleman to this question.

MR. MORRISSEY: Would the gentleman yield for an additional question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: Assuming arguendo that the gentleman did not hold any meetings where the public could comment, would the gentleman tell the body whether or not he gave any consideration to the governor's Blue Ribbon Commission that was made up with academics and scholars and constitutional scholars and lawyers and judges as to what they thought would be a good congressional map?

MR. JANIS: Well, I'm not sure I want to answer the gentleman's question because it's based on an assumption that I had — that he's inserted into the question, and that I've already answered is not a proper assumption.

MR. MORRISSEY: Would the gentleman yield for an additional question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: Yes or no, did the gentleman consider the governor's Blue Ribbon Commissions plan?

MR. JANIS: I would say to the gentleman that this plan is based on the criteria that I've outlined already, which is the constitutional mandate that it comply to one-person-one-vote, Virginia's constitutional mandate, all applicable federal law, all applicable federal case law, the Voting Rights Act most especially, that it complies with the zero retrogression rule, that it complies with the zero

variance rule, and it was the product of recommendation that was solicited from the current congressional delegation and that there were a series of public meetings, both last year and this year, where the public was given notice and an opportunity to be heard. And that's the methodology that was used in determining what these lines are in this legislation.

MR. MORRISSEY: Mr. Speaker, since the gentleman won't answer the question, may I speak to the bill at the appropriate time?

MR. SPEAKER: Yes.

MR. MORRISSEY: And would this be the appropriate time?

MR. SPEAKER: Yes.

MR. MORRISSEY: Thank you, Mr. Speaker.

MR. SPEAKER: It's not, but I'll get back to you. Trust me.

MR. MORRISSEY: Thank you, Mr. Speaker.

MR. SPEAKER: Gentleman from Alexandria, Mr. Ebbin.

MR. EBBIN: Thank you, Mr. Speaker. Would the gentleman from Henrico, Mr. Janis, yield for a question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield to my good friend from Alexandria.

MR. SPEAKER: Gentleman yields.

MR. EBBIN: I would ask the gentleman, in answering Delegate Morrissey, he said that there were hearings. I would ask him how much influence

the opinions of the citizens of Virginia as expressed at those hearings was given in the drawing of these plans compared to the requests of the members of Congress?

MR. JANIS: I would say to the gentleman that one of the consistent themes that came out of the public hearings was that we tried to maintain, to the greatest degree possible, local communities of interest and not split them up, and that that was one criteria that was permissive in nature that was applied here.

MR. EBBIN: Would the gentleman yield for another question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: The gentleman yields.

MR. EBBIN: The gentleman referred to the will of the electorate based on the 2010 elections, and I would ask the gentleman if he believes the will of the electorate in 2010, the election results, were intended to be the will of the electorate through 2022?

MR. JANIS: I would say to the gentleman that the voters went to the polls in November of 2010 and they elected 11 congressmen, Republican and Democrat. Some of them they elected for the first time; some of them they've elected for the fifth or sixth time.

And that these members of the congressional delegation, that one of the criteria that I applied here that is permissive in nature was that we were not going to deliberately — this plan was not going to deliberately lump existing congressmen together and

not cut existing congressmen out of their current congressional districts and that this plan was going to try to respect, to the greatest degree possible, consistent with the constitutional mandates and the federal law mandates, most especially the Voting Rights Act, with the core — it would respect the core of the existing congressional districts.

And that one of the permissive criteria that was applied was that this plan was not going to seek to deliberately re-engineer the map of Virginia in a way that was incompatible with the results of last year's election.

MR. MORRISSEY: Would the gentleman yield for one more question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: The gentleman yields.

MR. MORRISSEY: Is the gentleman implying that the election — that preserving the election results of 2010, preserving the seats of the incumbent congressmen, was 'more important than redistricting in a way that made sense with communities of interest and compact congressional districts?

MR. JANIS: I would say to the gentleman that I think you've posed me a false choice in the sense that this plan in House Bill 5004 respects the current boundaries to the greatest degree possible.

It reflects the dramatic shifts in population in the commonwealth, most especially the dramatic rise in population in northern Virginia at a time when there was corresponding population loss in south side and southwest Virginia.

That it tries to the greatest degree possible consistent with the one-person-one-vote rule and the zero variance rule that mandates that each of these districts must have at least 727,365 people but no more than 727,366 people.

That what this plan attempted to do was precisely what the gentleman seems to feel is a paramount objective, which is it attempted to preserve, to the greatest degree possible, localities intact and not split counties, cities, and town.

And, in fact, this plan splits fewer counties and cities and towns than the existing congressional district lines. This plan attempted to reunite, to some degree, communities like counties and cities and towns such as Allegheny, such as Brunswick, such as Caroline, and the city of Covington, that were split under the existing lines and reunite them into a single congressional district.

This plan went further and attempted not to split local communities of interest and, in fact, to reunite communities of interest that have been split below the locality level in previous redistrictings. Most notably, it reunites Reston in northern Virginia.

So I would say to the gentleman, you've kind of posed me a false choice, because the criteria that the gentleman seems to want to apply in drawing these districts are precisely the criteria that were applied in the drawing of House Bill 5004.

MR. EBBIN: I thank the gentleman.

MR. SPEAKER: Gentleman from Henrico, Mr. Morrissey.

MR. MORRISSEY: Thank you, Mr. Speaker. Mr. Speaker speaking to the bill?

MR. SPEAKER: Gentleman has the floor.

MR. MORRISSEY: You know, Mr. Speaker, ladies and gentlemen, we heard a lot from the gentleman from Henrico, but what volumes were spoken as to what was not said.

You know, I don't think my questions were really that difficult. For example, I asked, did you speak with the governor's commission. Asked it three times. And the — while we got lots of different answers, we didn't get a yes or no. So the answer's got to be, no, I didn't speak to the governor's commission.

You know, and if I were the governor and I were sitting in the west wing right — oh, Freudian slip. If I was sitting in the Patrick Henry building right now, I think I'd be a little upset that I put together this commission of assembling a wonderful cadre of people and then the author, who took great pains to say he is the only one that authored that bill, didn't speak to the governor's commission.

I asked another question. Did you speak — hold public meetings that perhaps maybe were memorialized with a court transcript. And, Mr. Speaker, he resorts to the proverbial "we" again, and I asked did you hold any meetings. And, again, silence. I guess we can only assume that the author of this bill did not hold any public meetings.

And then I asked a question, a really simple one. I don't think it's too difficult. Are there any minority-influenced districts? The gentleman knows what minority-influenced districts are. He was quoted

extensively recently the RTD. Well, he asked me to define it, and we know that the answer to that is there are no minority-influenced districts with respect to the African-American population, the Latino population, or Asian brothers and sisters.

So what are we left with? The gentleman did say, I spoke with every congressman. Well, Mr. Speaker, I say this, and I say this respectfully: So what?

You know, it reminds me of when you ask to speak to congressmen about drawing the lines, the Washington Redskins driving down the final game of the year. They've got to get that first down. It's fourth down and they send their fullback through the line, and they're about to place the ball down.

Do you think the referees are going to ask the Redskins, where would you like us to place the ball? Probably not the fairest scenario. You'd actually have maybe a referee do that.

So for the delegate from Henrico to say, I spoke with the congressmen, I respond, so what? We're not here to protect Congressman Connelly or Congressman Herd. We're here to do the people's business and to protect their interest.

Now, what we didn't hear from the gentleman who authored this bill, although we repeatedly heard that he complied with the Voting Rights Act with respect to retrogression, blah, blah, blah, blah, endlessly, endlessly, endlessly, what he didn't say is that he complied with communities of interest, compactness, contiguity, competitiveness.

Mr. Speaker, the author of this bill, Delegate Janis, I don't think just failed in representing the interests of the commonwealth; I think he failed woefully, and

I hope that the body would join me and reject House Bill 5004. Thank you.

MR. SPEAKER: Shall the bill be engrossed and passed as third reading? Those in favor of that motion will say aye.

RESPONSE: Aye.

MR. SPEAKER: Those opposed, no.

RESPONSE: No.

MR. SPEAKER: Bill is engrossed and passed with third reading.

Gentleman from Henrico, Mr. Janis.

MR. JANIS: Rise for purpose of the motion.

MR. SPEAKER: Gentleman may state.

MR. JANIS: Mr. Speaker, I move that the third constitutional reading for House Bill 5004 be dispensed with and the bill be placed on final passage.

MR. SPEAKER: Shall the third constitutional reading for House Bill 5004 be dispensed with and the bill placed on passage?

The clerk will close the roll.

THE CLERK: Ayes 94, no 0.

MR. SPEAKER: Ayes 94, no 0.

Gentleman from Henry, Mr. Armstrong.

MR. ARMSTRONG: Speaking to the bill on passage.

MR. SPEAKER: Gentleman has the floor.

MR. ARMSTRONG: Mr. Speaker and ladies and gentlemen of the House, I suppose I've learned a lot about the Voting Rights Act within the last year. The

gentleman from Henrico has said, I don't practice in that area, and neither do I. I guess maybe we do today.

But what's clear to me as an attorney in the development of House Bill 5004 suggests a pattern when you look at the development of House Bill 5001 dealing with House of Delegates redistricting. It is not enough to merely look at the minority population to determine if that is a minority majority district for voting purposes. You have to conduct the voting pattern analysis in order to determine what that percentage is.

You might have a minority population of 57 percent voting age population, but for whatever factors or reasons is not able to elect its majority — or its candidate of choice. And it's only when conducting that analysis is one able to determine whether or not it's a majority minority district at 57 percent or 53 percent. Which is why the Department of Justice has not historically pegged a particular number. It's not 54, it's not 55, it's not 56, because it depends on the performance of the district.

And when you don't do the regression analysis, either for the house plan or the congressional reapportionment plan, you can crack and pack, the slang terms used to either put too many minorities in a district or too few. And the gentleman today from Henrico has readily admitted, like the gentleman from Suffolk before him — yes, we got input, but there was never the historical voting analysis, which is a very mathematical statistical exercise by experts and professionals was done.

Do we not have the resources in this state? Last time I checked we had a multimillion dollar budget for legislative services. I think Mary Spain is one of the smartest people on the planet, but if she wasn't able to do it, there are experts out there that could have done it.

Suggests to me that there was a pattern in failure to do what is necessary to establish these districts as minority majority districts, no more, no less.

Second thing. At least the gentleman from Henrico admitted today that one of the criteria that he used in development of the plan was incumbent protection. We were devoid of that admission the other day with House Bill 5001.

Now, I have nothing against consulting the members of Congress about their districts. Certainly they're familiar with communities of interest. keeping localities whole. But what about the other 7,999,991 Virginians who have an opinion about the matter?

As the gentleman from Henrico, Mr. Morrissey pointed out, I think bubbled up through the governor's commission. Where was that influence?

No, what you have here today is business as usual, just like redistricting was done 10 years ago and 20 years ago, all the way back to Patrick Henry gerrymandering Madison. The exercise is one for incumbency protection first, last, alpha, and omega.

The last thing that I would say, Mr. Speaker, is I know the Voting Rights Act does not require a minority-influenced district, but why wouldn't you do that if you had the ability to do it? There's no mandate about the makeup of gender of having

women in politics, but isn't this body strengthened by the inclusion of women here? Or Latinos? Or African-Americans? And why were we not given the opportunity at least to consider that?

Mr. Speaker, I agree with my good friend from Henrico, Mr. Morrissey, this bill is flawed like House Bill 5001 before it, and I would urge the body to reject it on passage.

MR. SPEAKER: Shall the bill pass? The clerk will post the roll.

THE CLERK: Ayes 71, nos 23.

MR. SPEAKER: Ayes 71, nos 23. The bill is passed.

CERTIFICATE

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing audiotape, videotape, and/or hearing was transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; and that I am not a relative or employee or any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of April, 2014.

_____

Grace Hitchman, CET-663
In and for the State of Washington,
residing at Seattle.
Commission expires April 27, 2016

State of Virginia Regular Session

June 9, 2011

Verbatim Transcript of Proceedings

Transcribed from Audio/Video Recording

THE CLERK: Calender of the House of Delegates for Thursday, June 9, 2011. House Bill has pended amendment, House Bill 5004, the bill to amend the code of Virginia relating to congressional districts passed by the Senate with substitute.

MR. SPEAKER: Gentlemen from Henrico, Mr. Janis.

MR. JANIS: Thank you, Mr. Speaker, members of the House.

Just by way of review, House Bill 5004 is the legislation that passed out of the House of Delegates on April the 12th by a vote of 71 to 23. The legislation is part of the redistricting that is required every ten years under the United States Senate.

And what House Bill 5004 does is it reapportions the district boundaries of the 11 Virginia congressional districts to reflect the results of the 2010 census.

The Senate has made a rather significant amendment to the bill, and the practical effect of the amendment is to take the 3rd Congressional District from what is a majority minority district with a voting percentage of about 56 percent in House Bill 5004 as passed by this body, reducing that to about a 40 to 42 percent minority percentage voting district. And then move voters from the western end of the current 3rd Congressional District into the 4th

Congressional District as well as making some adjustments in the Roanoke Valley.

I'm going to ask the body to reject the Senate amendments and send this to a committee of conference.

MR. SPEAKER: Gentleman from Henrico, Mr. Morrissey.

MR. MORRISSEY: Thank you, Mr. Speaker. Mr. Speaker, would the gentleman yield for a question?

MR. SPEAKER: Gentleman yield?

MR. JANIS: Yield.

MR. SPEAKER: Gentleman yields.

MR. MORRISSEY: I would ask the gentleman that — I saw at least two different versions of the governor's Blue Ribbon Commission's recommendation on the congressional redistricting plan. Can you remind this body whether or not House Bill 5004 has incorporated a single recommendation from the governor's panel on the congressional redistricting?

MR. JANIS: Not being as familiar with the governor's panel and its recommendations vis-à-vis the congressional districts, I'm not competent to offer an opinion about whether House Bill 5004 as it passed this House on April 12 of 2011 or as it's currently amended, which recommendations of that committee are incorporated and which are not.

MR. MORRISSEY: Will the gentleman yield for another question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: The gentleman yields.

MR. MORRISSEY: Given that the competing plan promulgated by Senator Locke would create two African-American districts, one a majority minority, one a minority-influenced district, which would approximate 18 percent of African-Americans in the commonwealth; and given that there are approximately 22 percent African-Americans in the commonwealth; and given, thirdly, that your plan only would entail 9 percent African-American representation in the commonwealth, would we not be better off with Senator Locke's plan that close — more closely approximates the African-American voting population in the commonwealth?

MR. JANIS: I would say to the gentleman, what you have in House Bill 5004 as it passed this House and what you have in House Bill 5004 after Senator Locke's amendment are basically two plans. In each of these plans, the final outcome is that you have one of the 11 congressional districts where a majority of the population, based on the 2010 census, is African-American, and another adjustment district, south and east of Richmond, where there is a significant plurality of African-American vote but not a majority.

The only difference between 5004 as it passed this House and 5004 as it's currently amended with the Senate amendments, is that the majority African-American congressional district under the plan as introduced is the 3rd District, and under the Locke amendment, it's the 4th District.

Other than that, there's no — I see no way that the plan with the Locke amendments enhances or

increases the likelihood that African-Americans would be elected in either one of these districts. In fact, in the 3rd Congressional District what you see is that the existing minority population, which is in excess of 51 percent, the majority minority district, the 3rd Congressional District, goes from a district which is probably about 56 percent to a district that's 40 percent, thereby reducing and diminishing minority voter influence in the 3rd Congressional District.

So the answer is no.

MR. MORRISSEY: Will the gentleman yield for another question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I yield.

MR. SPEAKER: The gentleman yields.

MR. MORRISSEY: Although the gentleman just said, to summarize, there's no significant difference, isn't there, in fact, a huge difference in that Senator Locke's plan creates a minority-influenced district; however, House Bill 5004 only has one majority minority district and no minority-influenced district. Isn't that a true statement?

MR. JANIS: And I would say, no, that's not a true statement, Mr. Speaker, because what the gentleman is defining as a minority-influenced district apparently is a district that has some plurality of African-American voters in it without any specificity as to how much of a plurality you would have to have in order to be qualified as a minority-influenced district.

What I would say to the gentleman is, the voters that were identified in the 2010 census, particularly African-American voters and African-American population south and east of Richmond, haven't been moved because of the amendments in the Locke bill; they simply have been moved from the 3rd Congressional District into the 4th Congressional District. And, candidly, you still only have one district created, either under the Locke amendment or under the bill as it passed the House, where you have at least 51 percent of the population being African-American.

That district happens to be in the introduced version, Congressional District Number 3, currently represented by Delegate Scott. Under the proposals of the Locke amendment, it would become Congressional District 4, currently represented by Representative Forbes.

MR. MORRISSEY: Will the gentleman yield for a final question?

MR. SPEAKER: Will the gentleman yield?

MR. JANIS: I would be happy to yield for a final question.

MR. SPEAKER: The gentleman yields.

MR. MORRISSEY: I appreciate the gentleman's concern now and earlier expressed in his — about retrogression, and am encouraged on his newfound sensitivity to that issue. But I would ask the gentleman, is there any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50? Or is it just a number that has been pulled out of the air?

MR. JANIS: I would say to the gentleman that in evaluating the relative merits of House Bill 5004 as it passed the House initially and these proposed Locke amendments, which I'm going to request everyone to reject here momentarily, that what you're doing is, you're weighing a certainty against an uncertainty.

When you look at what happens to the 3rd Congressional District in the Locke amendments, it takes the congressional 3rd district, currently represented by Representative Scott, from 56 percent African-American population to 40 percent. That is, ipso facto, a reduction in minority voter influence in the 3rd Congressional District.

And I would suggest that that is the classic definition of retrogression, and it is precisely what is impermissible under the Voting Rights Act. When it does this, it creates another 51-plus percent majority minority district now within the confines of the 4th Congressional District, which I am uncertain, and I think no one can give you an absolute answer, passes Voting Rights requirements.

So you're weighing a certainty, House Bill 5004, which passed this House with 73 affirmative — with 71 affirmative votes on April the 12th, that meets all the requirements of the United States Constitution, the Virginia Constitution, the Voting Rights Act, all applicable federal and state laws, you weigh the certainty of 5004 as it was voted on by this House in April will pass all the constitutional and legal requirements against the uncertainty as to whether or not the Locke proposal would actually be permissible under the Voting Rights Act, particularly because it takes the 3rd Congressional District and

retrogresses it to make 56 percent minority voting district to a 40 percent minority voting district.

MR. MORRISSEY: Thank you, gentlemen.

MR. SPEAKER: Gentleman from Alexandria, Ms. Herring.

MS. HERRING: Thank you, Mr. Speaker. Speaking to the amendment?

MR. SPEAKER: Gentleman has the floor.

MS. HERRING: Thank you. Where to begin, Mr. Speaker. There are basically three points I want to make about the amendment. I would ask that the House support them, and this is why.

The amendments proposed by the Senate make the districts more compact. Just reading about the Voting Rights Act and briefing up on it, it seems the purpose of the majority minority district is to increase diversity of choice, giving all members of our community to be represented by their candidate of choice.

In addition to protecting communities of interest and increasing compactness, the Senate plan basically makes the districts more compact. For example, the 3rd Congressional District went from Richmond, Henrico, and through Tidewater, and now it's total contained in Hampton Roads.

For the 5th Congressional District — that was in the old plan. The 5th Congressional District went from the North Carolina to the northern Virginia exburbs, namely Fauquier County. The Senate amendment stops at 40 miles further south in Culpeper.

Also, Mr. Speaker, there's — Delegate Janis mentioned retrogression. And I would like the House to know that with that analysis on retrogression, it just doesn't stop there. You just can't say it's just because the voting population falls below a certain level, then the review stops, and then it's not — it won't pass muster under the Voting Rights Act.

I looked at the Federal Register, which gives guidance, and it's dated February 9, 2011, and it says — it's the attorney general in determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan. "The attorney general does not rely on a predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, the determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district."

The Senate limits, Mr. Speaker, also reunite communities of interest. Additionally, they create more competitive districts under the House plan.

I know there may be some concern by some members of the House that perhaps by making a district less African-American that an African-American — that we'll follow (inaudible) may not win. But I believe that our laws provide protection for minority districts and minority-influenced districts.

And the Senate plan seems to be — Senate amendments, rather, seem to be something that's consistent with the law that would be acceptable and promotes all factors that we used to determine whether the Voting Rights Act is complied with.

MR. SPEAKER: Shall the Senate amendment be agreed to?

The clerk will post the roll.

THE CLERK: Ayes 30, noes 56.

MR. SPEAKER: Ayes 30, noes 56. The Senate amendment is rejected.

State of Virginia Regular Session
January 20, 2012
Verbatim Transcript of Proceedings
Transcribed from Audio/Video Recording

* * *

[Page 13]

THE CLERK: Senate calendar for Friday, January 20, 2012.

Regular calendar house bill on third reading. House Bill 251, a bill to amend and reenact 2.2-508 of the Code of Virginia, to amend the Code of Virginia by adding a section Number 24.2-302.2 and to repeal 24.2-302.1 of the Code of Virginia relating to congressional districts.

Reporter for the Committee on Privileges and Elections.

MR. PRESIDENT: The senator from Harrisonburg, Senator Obenshain.

MR. OBENSHAIN: Mr. President, I move passage of the bill, speaking to the bill.

MR. PRESIDENT: Senator has the floor.

MR. OBENSHAIN: Mr. President, members of the Senate, House Bill 251 is the redistricting bill. It is largely — it is entirely in the form that has been before us for almost a full year. The bill has a — contains a plan that preserves a core of each of the current 11 congressional districts, and it has changes that do comply with the one-person-one-vote requirement.

This plan is one that protects communities of interest, and the cores of existing districts so that citizens will know who their congressman is. The plan is one that has bipartisan support. It is supported by members of both parties in the House of Delegates last year and again this year. This year there were nine House Democrats who voted in favor with two not voting, and by each of the eight Republicans and three Democratic members of Congress approving their districts.

This plan is compact to the extent practicable in complying with the one-person-one-vote, it is contiguous as well. The plan is drawn to zero deviation in order to comply with the one-person-one-vote requirement, and there can be one vote difference between the districts. The majority minority district, the 3rd district, has not been retrogressed, preserving its integrity, satisfying the Voting Rights Act.

This is a bill that we should have been able to, I think, muster the consensus to act on before now. But because we were unable to muster that consensus, this bill remains before us and is back before us today for consideration. Accordingly, Mr. President, I move its passage.

MR. PRESIDENT: Thank you, sir. The senator from Hampton, Senator Locke.

MS. LOCKE: Mr. President, I stand in opposition to this legislation, which clearly is designed to protect incumbents, leaving many minority Virginians without the opportunity to vote for a candidate of choice.

Clearly, the one-quarter population that is minority was not given much consideration in the drafting of this plan that was presented to us in the special session. It was wrong then, and it's wrong now.

The 3rd Congressional District has been packed with a percent African-American population. That means that those African-Americans living in the 1st, 2nd, and 4th congressional districts that abut the 3rd are essentially disenfranchised, being limited in their choices, since the districts are drawn to protect candidates of one party. Thus, this plan is not about the citizens of the commonwealth but about protecting individuals who currently hold the offices.

There was no effort on the part of the house to reach a compromise on the two bills introduced last year, but "have it our way or no way at all." And that is what brings us to this bill here today, and I stand up in adamant opposition.

MR. PRESIDENT: Thank you, Senator. The senator from Southern Fairfax, Senator Barker.

MR. BARKER: Mr. President, speaking to the bill.

MR. PRESIDENT: Senator has the floor.

MR. BARKER: Mr. President, I too rise in opposition to this bill and do so on two counts. One is a representation as it relates to the voices of minority voters, and particularly African-American voters, in the commonwealth.

African-Americans are 19 percent of the state population and yet, they are limited in terms of significant influence to only one district, which

represents 9.1 percent of the 11 districts that we have.

Should there be two seats in which there was a significant African-American voice that would be heard, that would comply with the distribution of the population and would represent 18.2 percent of the population. The measure that passed the Senate last year, a measure that did not pass in the House of Delegates and therefore did not become law. would have provided African-Americans with a district that was a majority African-American district and a second district that was a significant African-American-influenced district with over 40 percent of the population of that district being African-American.

That would have been equity. That would have been fairness. That would have provided the voice that I think is due in terms of our consideration here and certainly something that would have clearly been in compliance with the Voting Rights Act.

The other issue I wish to raise is the constitutionality of us passing this measure this year. The Constitution is quite clear. The Constitution says: "The General Assembly shall reapportion the commonwealth into electoral districts in accordance with this section, in the year 2011 and every ten years thereafter." It does not provide leniency. It does not provide latitude to provide the reapportionment to be done in any other year than a year ending in "1."

We did not get that done, and therefore failed to fulfill our constitutional responsibility. And I believe it is inappropriate to do so this particular year.

I would also note that there was a constitutional amendment passed in 2004, passed through the General Assembly in 2003 and 2004. and then adopted by the voters in 2004, that added a paragraph to this section of the Constitution. And that section, in effect, takes the language that was already there in terms of representation of the General Assembly shall do it in the year ending in "1" but also makes it clear that this is the year in which it is required.

The language that it specifically held, that is specifically in the Constitution, states — just paraphrasing at the end of a sentence: The term being served in the year that the reapportionment law is required to be reenacted. So we have both the use of the word "shall" and the use of the word "required." There is no ambiguity in that.

I recognize, as has been pointed out by some, that in terms of implementation of laws that exist within Virginia and also other places, there is sometimes some leniency given to the word "shall." But I do not believe, based upon my understanding of things and what has been pointed out in terms of other cases, that there is that latitude as it relates to the Constitution.

And, therefore, I believe it is improper and not in compliance with the Constitution for us to ask on our reapportionment law in a year that does not end in "1."

And, therefore, for those two reasons, I will oppose this measure.

MR. PRESIDENT: Thank you, Senator. The junior senator from Henrico, Senator McEachin.

MR. McEACHIN: Mr. President, I would ask if the senator from Harrisonburg would be willing to resume the floor for purposes of some questions.

MR. PRESIDENT: Will the senator from Harrisonburg yield for a question?

MR. OBENSHAIN: I will.

MR. PRESIDENT: The senator yields. The junior senator from Henrico, Senator McEachin.

MR. McEACHIN: Mr. President, I would ask the senator if he agrees with me that Section 2 of the Voting Rights Act prevents the dilution of African-American voting strength as well as minority voting strength, whether it be African- American or some other minority.

MR. PRESIDENT: Senator from Harrisonburg, Senator Obenshain.

MR. OBENSHAIN: Mr. President, I would reply to the gentleman by saying that we had counsel from the attorney general's office before the committee addressing issues of law. I would respectfully submit that this bill complies with the requirements of the Voting Rights Act and, accordingly, I submit that it should be passed.

MR. PRESIDENT: Okay, junior senator from Henrico, Senator McEachin.

MR. McEACHIN: Further question, Mr. President.

MR. PRESIDENT: Has the floor.

MR. McEACHIN: Mr. President, if the senator declines to answer the question, I certainly understand. But the question is, does the senator understand that Section 2 of the Voting Rights Act prohibits dilution of minority voting strength.

MR. PRESIDENT: The senator from Harrisonburg, Senator O.

MR. OBENSHAIN: Mr. President. I would respond to the gentleman that I decline his invitation to get into a running debate on the legal interpretation of the provisions of the Voting Rights Act. I would submit that this bill is one that complies with the requirements of the Voting Rights Act.

MR. McEACHIN: Speaking to the measure, Mr. President.

MR. PRESIDENT: Senator has the floor.

MR. McEACHIN: Mr. President, it is unfortunate that the chairman of the Privileges and Elections committee and a candidate for higher office declines to discuss this bill and its legal ramifications on the floor of this chamber. It is unfortunate that we're not going to have that sort of debate...

MR. OBENSHAIN: Senator, the reference to a candidate for higher office is probably inappropriate. If he could refrain from that reference —

MR. McEACHIN: I apologize to the president, and I apologize to the Senate.

Mr. President, to continue, it is unfortunate that we are not going to have that debate, because we are allegedly a deliberative body. And we are allegedly supposed to come together one and another and speak to one another and to reason together what should be the law.

But we're not going to have that debate today. Section 2 of the Voting Rights Act clearly says that minority voting strength should not be diluted.

There are two ways to dilute minority strength. One is cracking, that is to lessen the population more than necessary to prevent minorities from being able to have a candidate of choice. That is sometimes referred to as retrogression, and that is the language that we have used thus far in this debate.

But there is also the notion of packing. That is, putting more African-Americans or more minorities in a single congressional district, more than what is necessary to elect a candidate of choice and, indeed, depriving minorities of their ability to influence elections elsewhere. That is a violation of Section 2 of the Voting Rights Act.

That is what we are violating today. Not only is this an unconstitutional act as has been stated previously, we are also violating the Voting Rights Act.

60 percent African-American voting age population is not necessary in the 3rd Congressional District to afford minorities the opportunity to choose a candidate of their choice.

I think it should be footnoted at least, and remind the members, that the Voting Rights Act does not guarantee an outcome. In other words, it does not guarantee African-Americans or a minority will get elected. It merely offers minorities an opportunity to elect the candidate of their choice, regardless of the color of their skin.

A plan was offered last year, and would certainly maximize African-American voting strength, by allowing two congressional districts to be influenced by African-Americans. I would submit to you that the mere fact that is able to be done shows that

Section 2 of the Voting Rights Act is being violated by the very acts that we purport to want to take today.

Mr. President, it is not too late. We still have miles to go before we sleep on this issue. This matter will still have to go through some form of preclearance.

But what we ought to do is to engage in a debate, to noodle through, if you will, what Section 2 means. Are we — to challenge my assertion, if you are able, that we are packing the 3rd Congressional District unnecessarily.

It is unfortunate that we are not going to have that debate on the floor of this chamber, but I would submit to you that we are in violation. Not only are we taking an unconstitutional act, but we are packing the 3rd Congressional District and deliberately denying minority voters the opportunity to influence congressional districts elsewhere.

I thank you, Mr. President.

MR. PRESIDENT: Thank you, Senator. The question is, the senator from Harrisonburg, Senator Obenshain.

MR. OBENSHAIN: Mr. President, speaking to the bill, ladies and gentlemen of the Senate, first of all, I would submit that this is a debate that has been going on for ten months. The Senate of Virginia, the General Assembly, has had this plan before it for the better part of a year.

We, as a matter of fact, remained in session during the entire remainder of 2011, and yet we were not called back into session to continue the debate on this set of bills. We have had ten months within which to

continue this discussion. This discussion has been ongoing. I rather believe that the members of this body are rather set in their personal views about the merits of this plan.

As to the constitutionality of this provision, I respectfully submit that the Constitution clearly does not prohibit us from taking this action at this time. And, as a matter of fact, it was the failure of last year's majority to call us into session to have a vote upon the plan that remained before us that had some impact upon our failure to act last year, or inability to act last year.

Moreover, the history of redistricting in the commonwealth of Virginia is that we have, indeed, passed redistricting bills in nondecennial years in 1982, 1983, 1992, 1993, 2005, 2007. Each of those years we passed a redistricting bill.

Moreover, I would respectfully disagree with the interpretation of the constitutional provisions that have been pointed out by my colleagues on the other side of the aisle. And, indeed, I would respectfully submit that the Supreme Court of Virginia has long taken a position that is at odds with the position articulated by my friends on the other side.

I respectfully submit that it is proper, indeed, it is our duty to act upon this now at this time. I respectfully submit that this bill complies with the requirements of the Constitution of Virginia, and it complies with the requirements of the Voting Rights Act.

Accordingly, I renew my motion for passage.

MR. PRESIDENT: Thank you, sir. The question is, shall the bill pass? All in favor of the passage of the bill will record their votes aye, those opposed no.

Are the senators ready to vote? Have all the senators voted? Do any senators desire to change their vote?

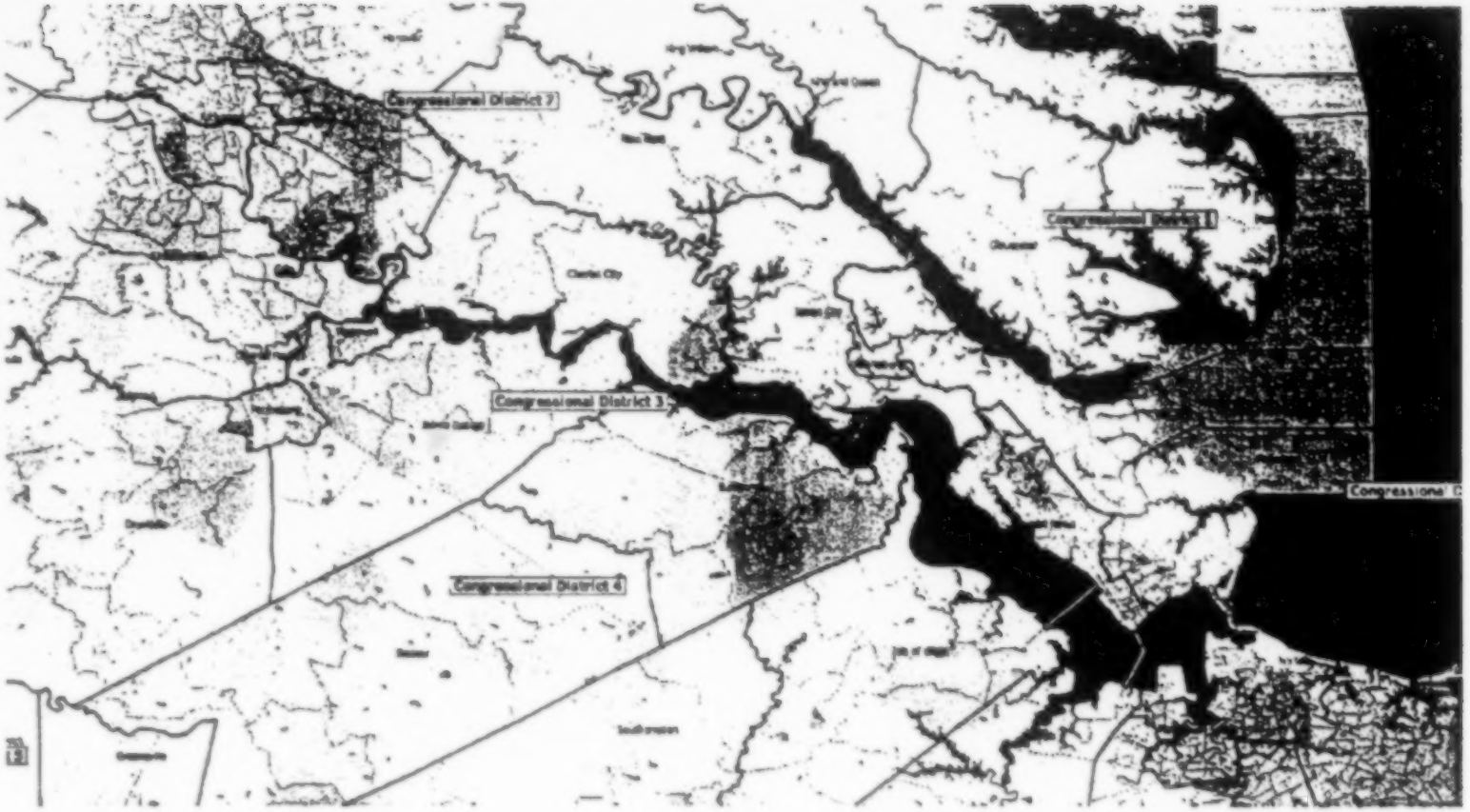
The clerk will close the roll.

THE CLERK: Ayes 20, noes 19.

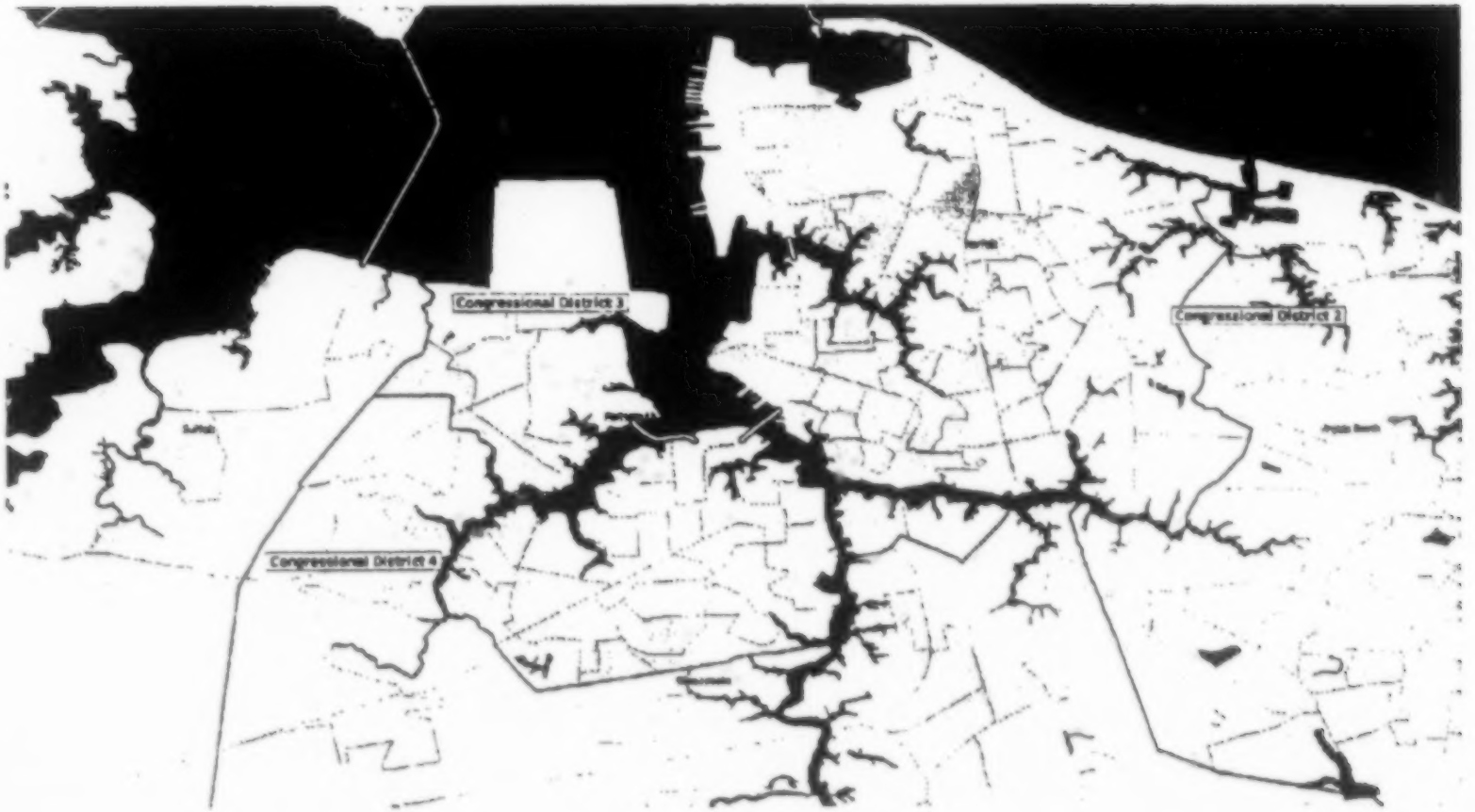
MR. PRESIDENT: Ayes 20, noes 19. The bill passes.

* * *

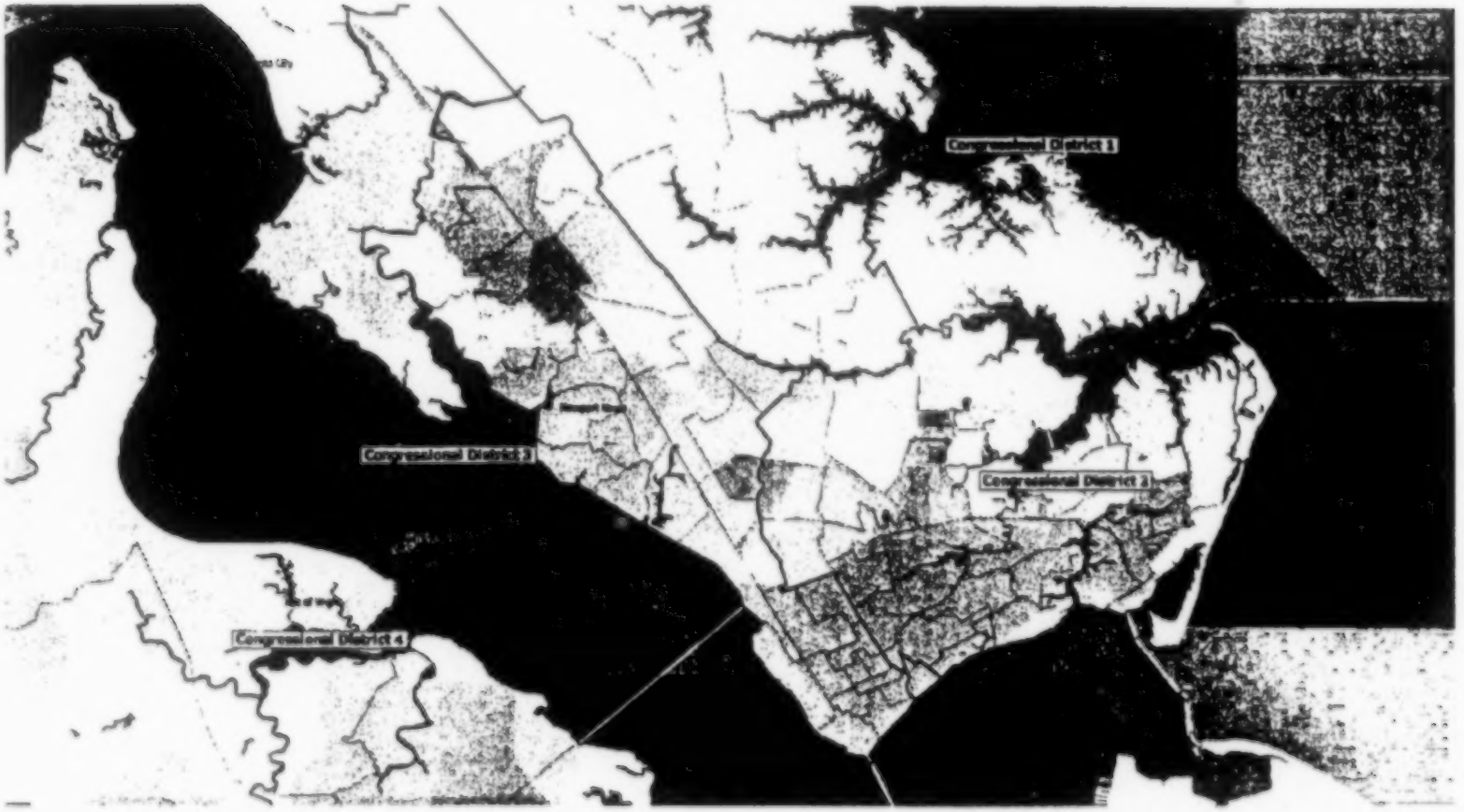
Enacted Congressional District 3



Enacted Congressional District 3 – Detail



Enacted Congressional District 3 – Detail



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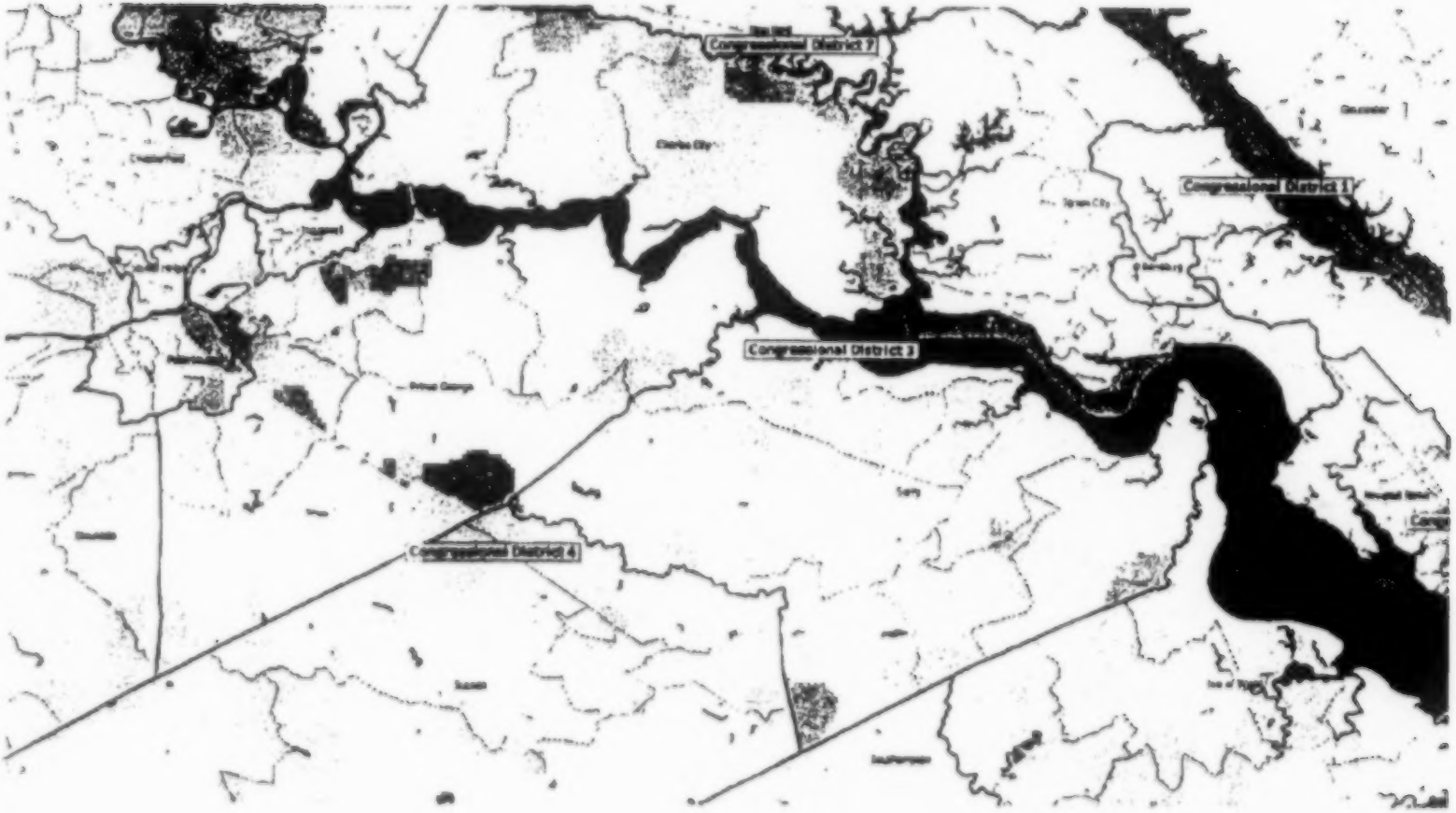

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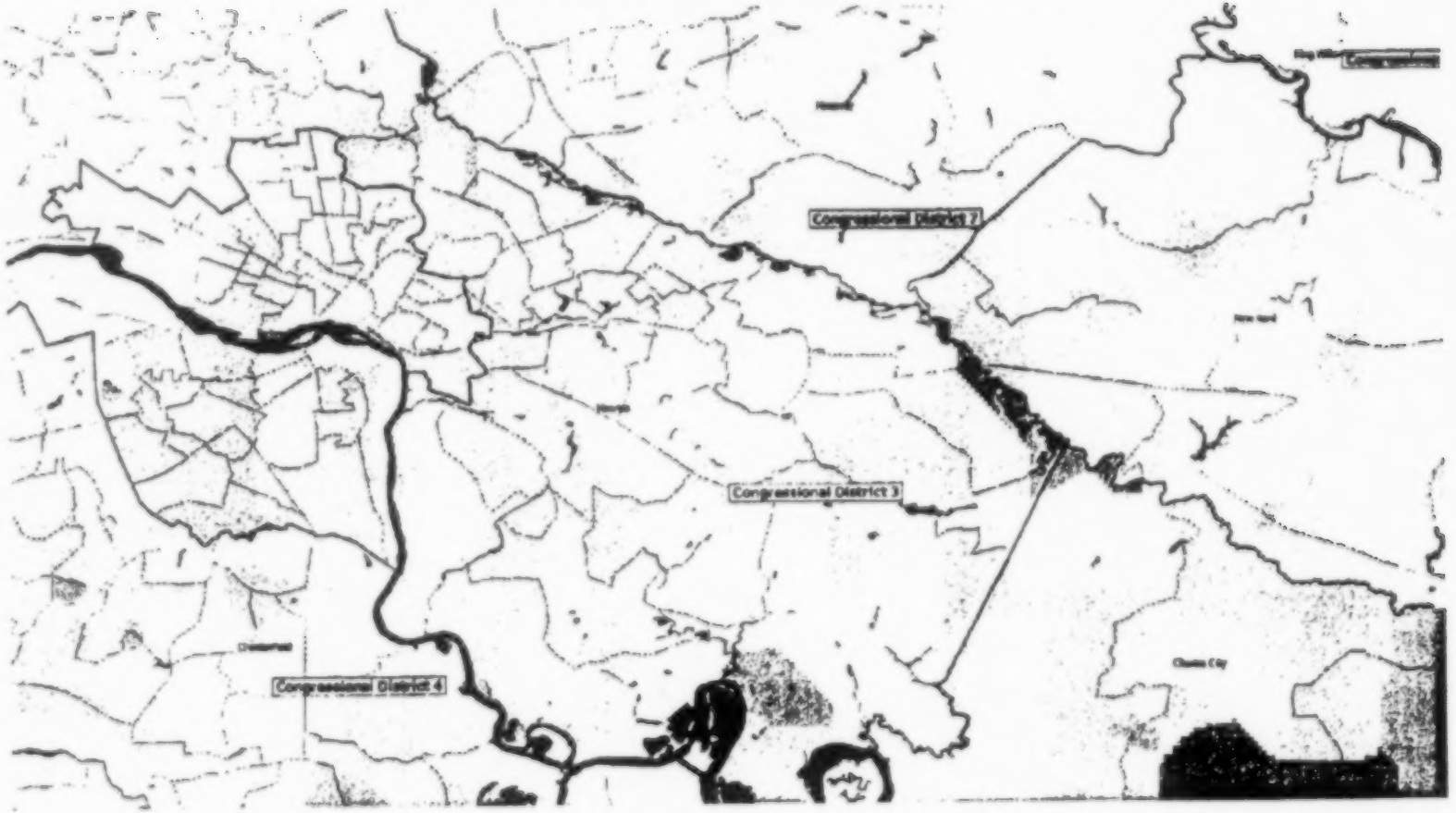
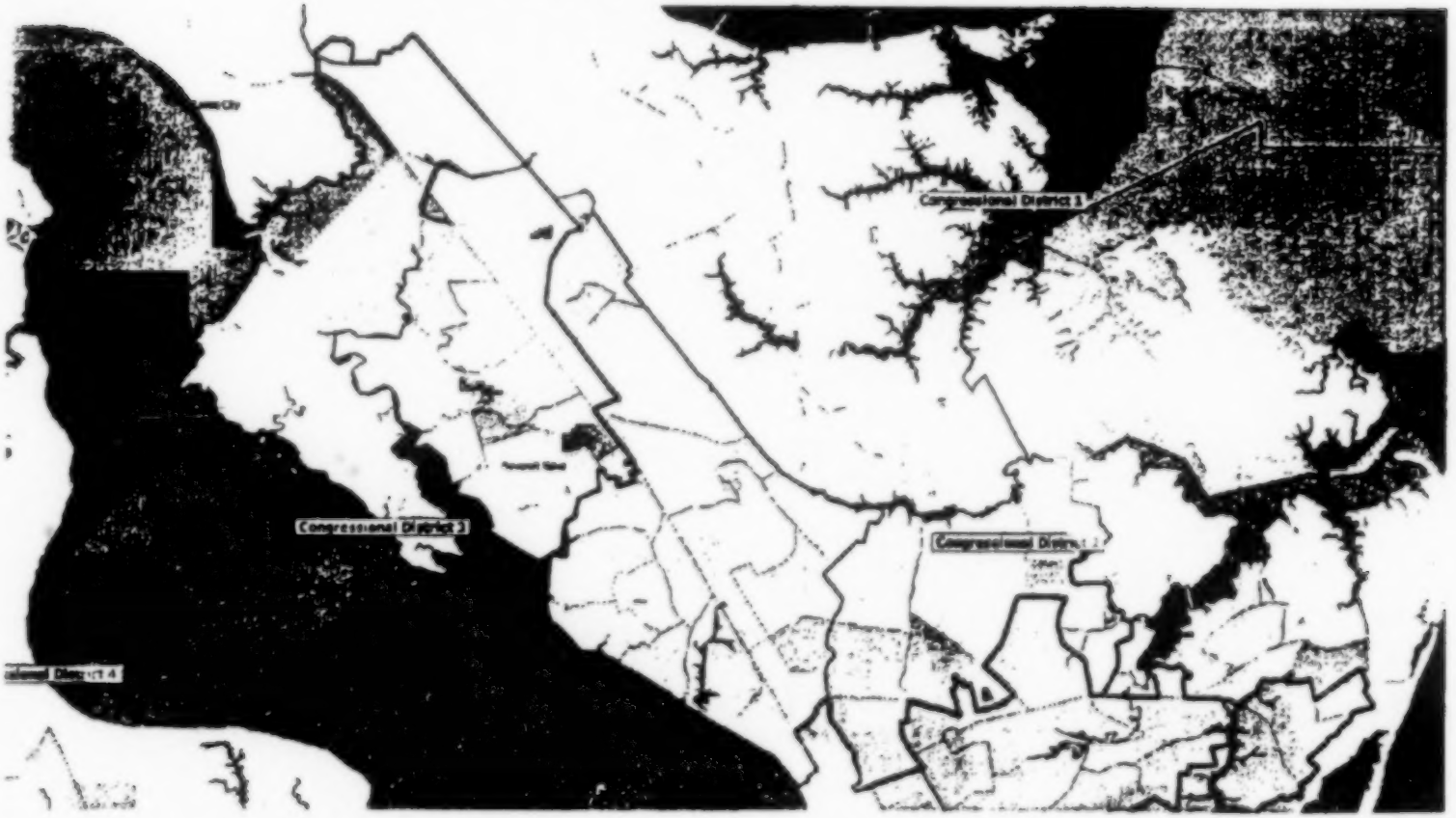


Enacted Congressional District 3 –
Detail with Benchmark Boundaries (Red)



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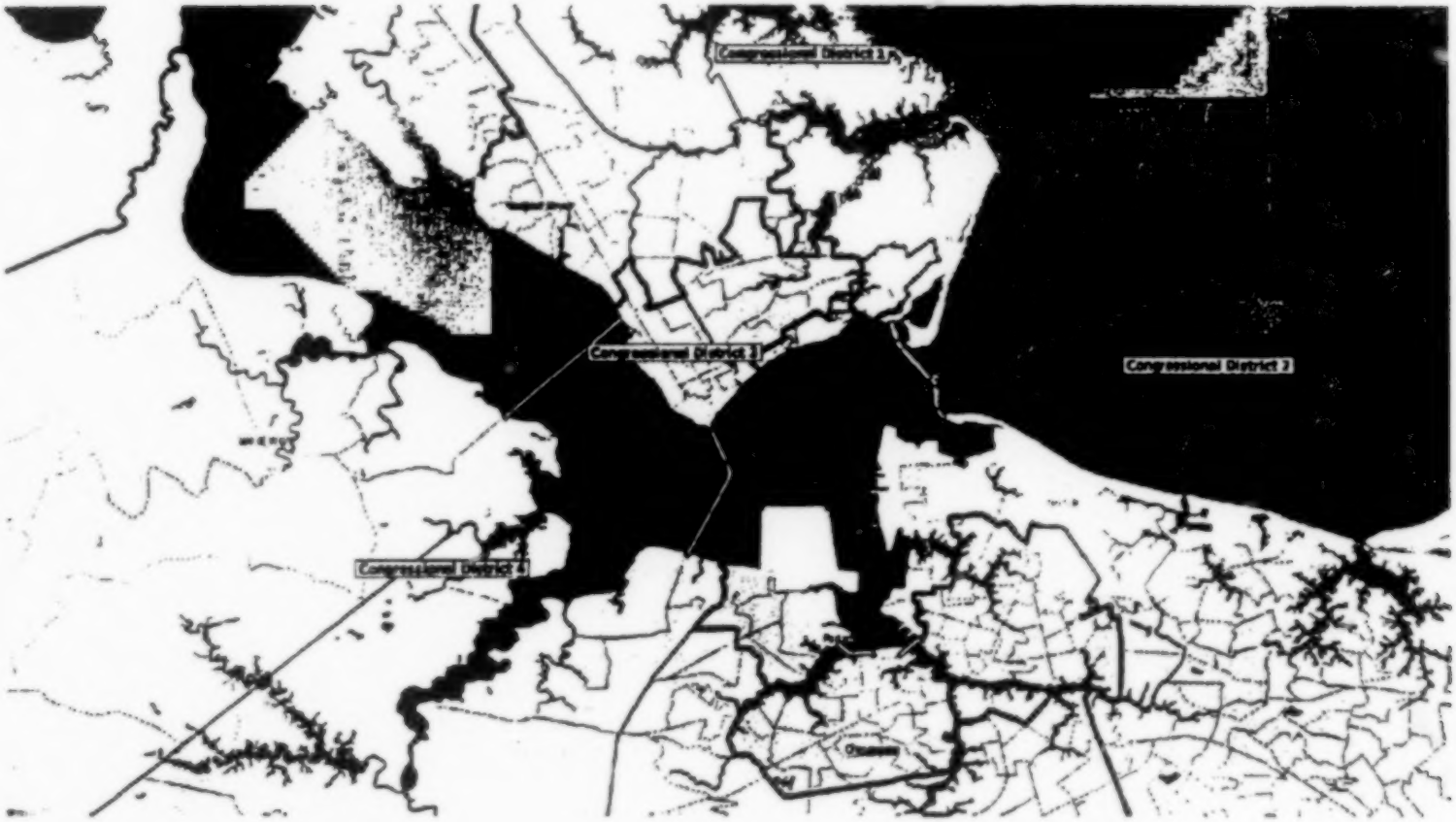
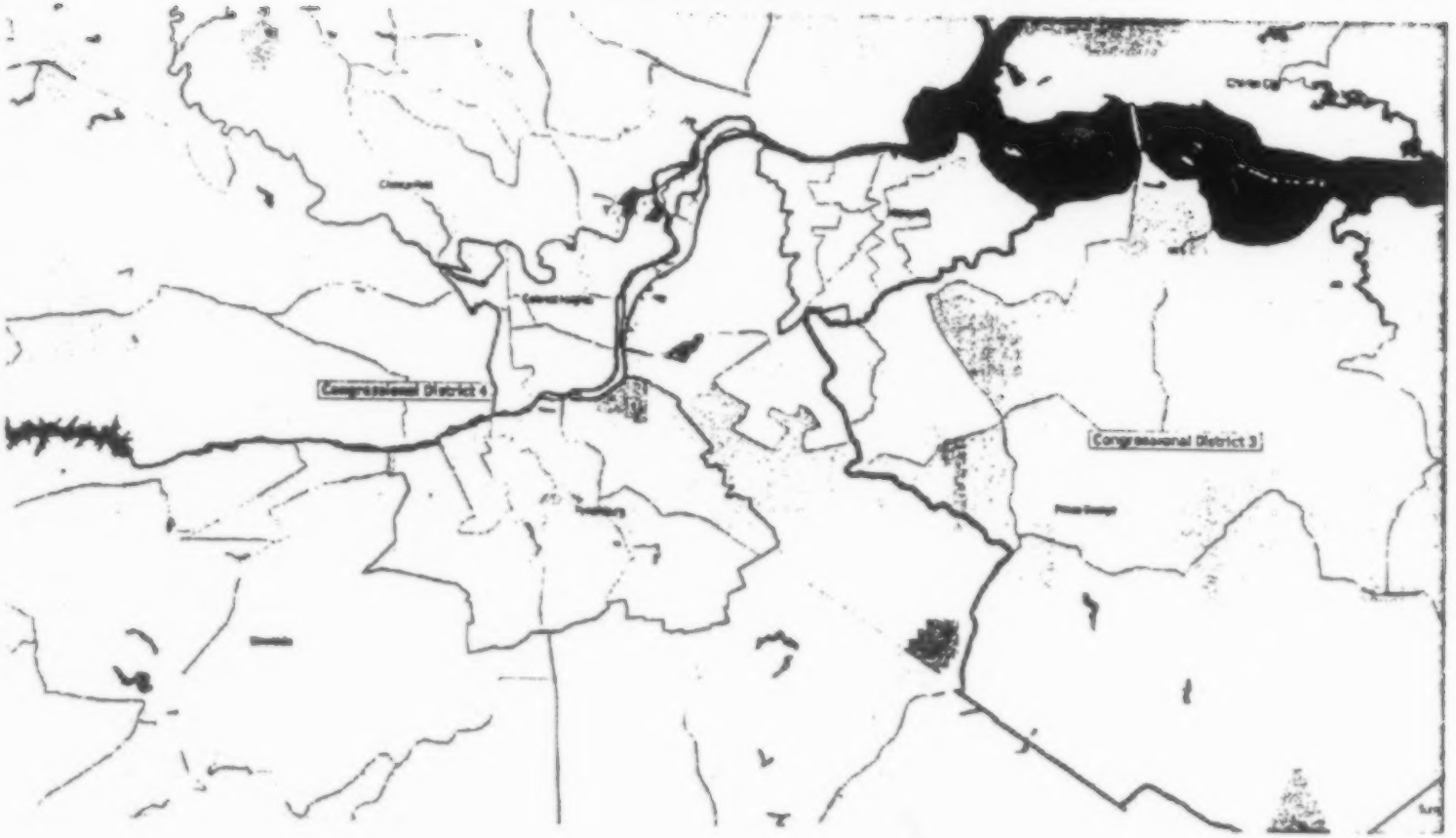
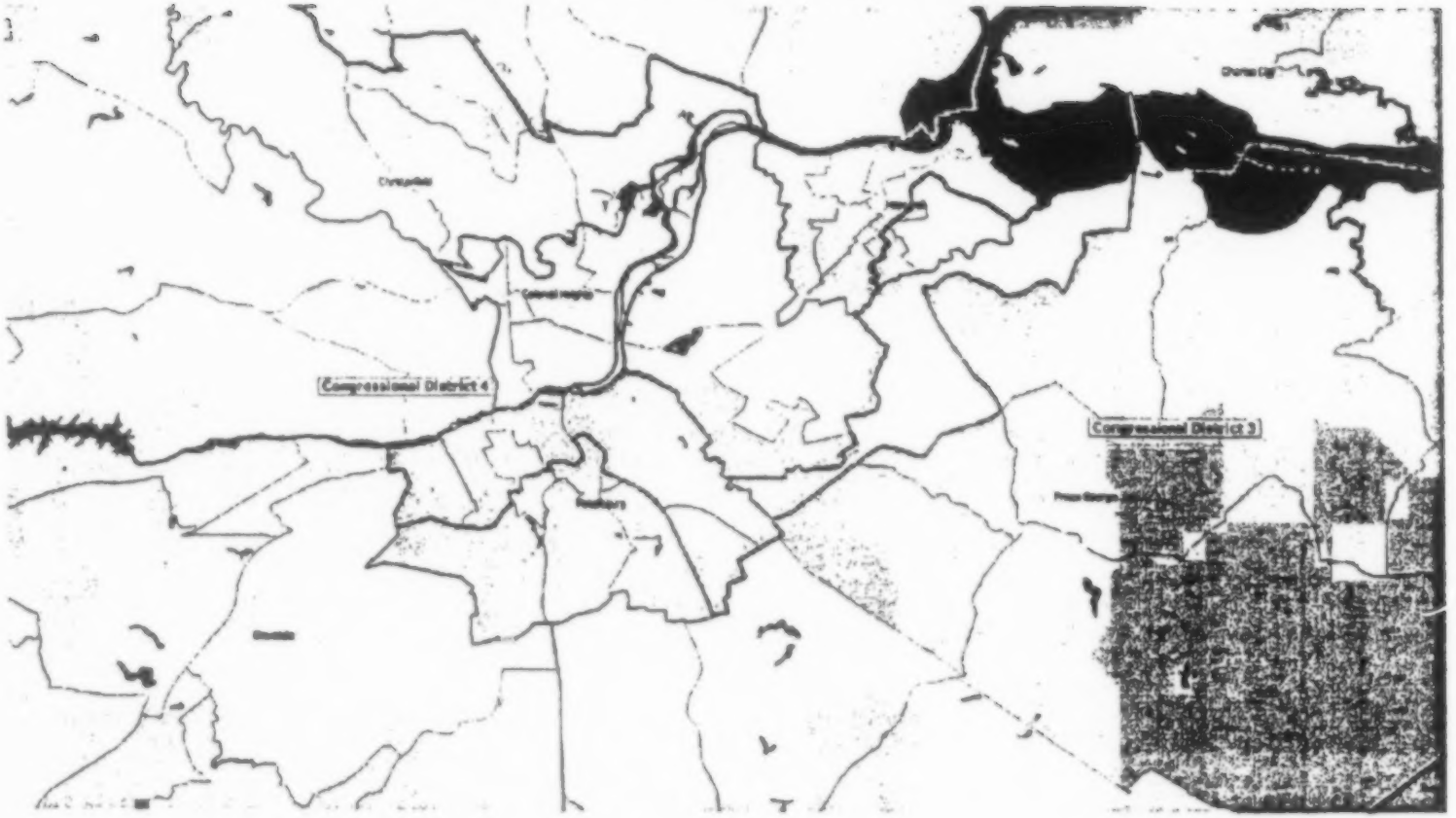
Detail with Benchmark Boundaries (Red)



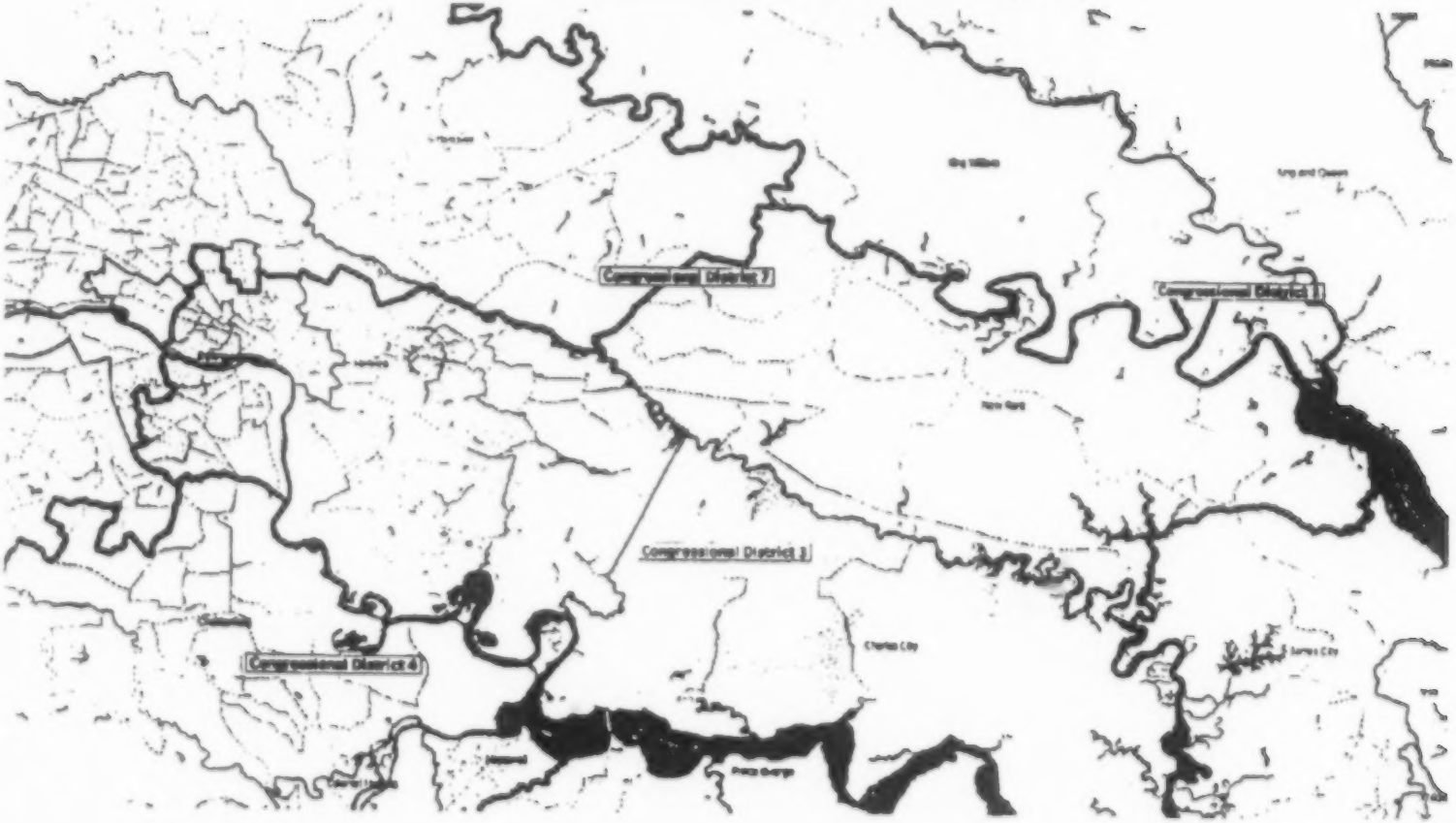
Enacted Congressional District 3 –
Detail with Benchmark Boundaries (Red)



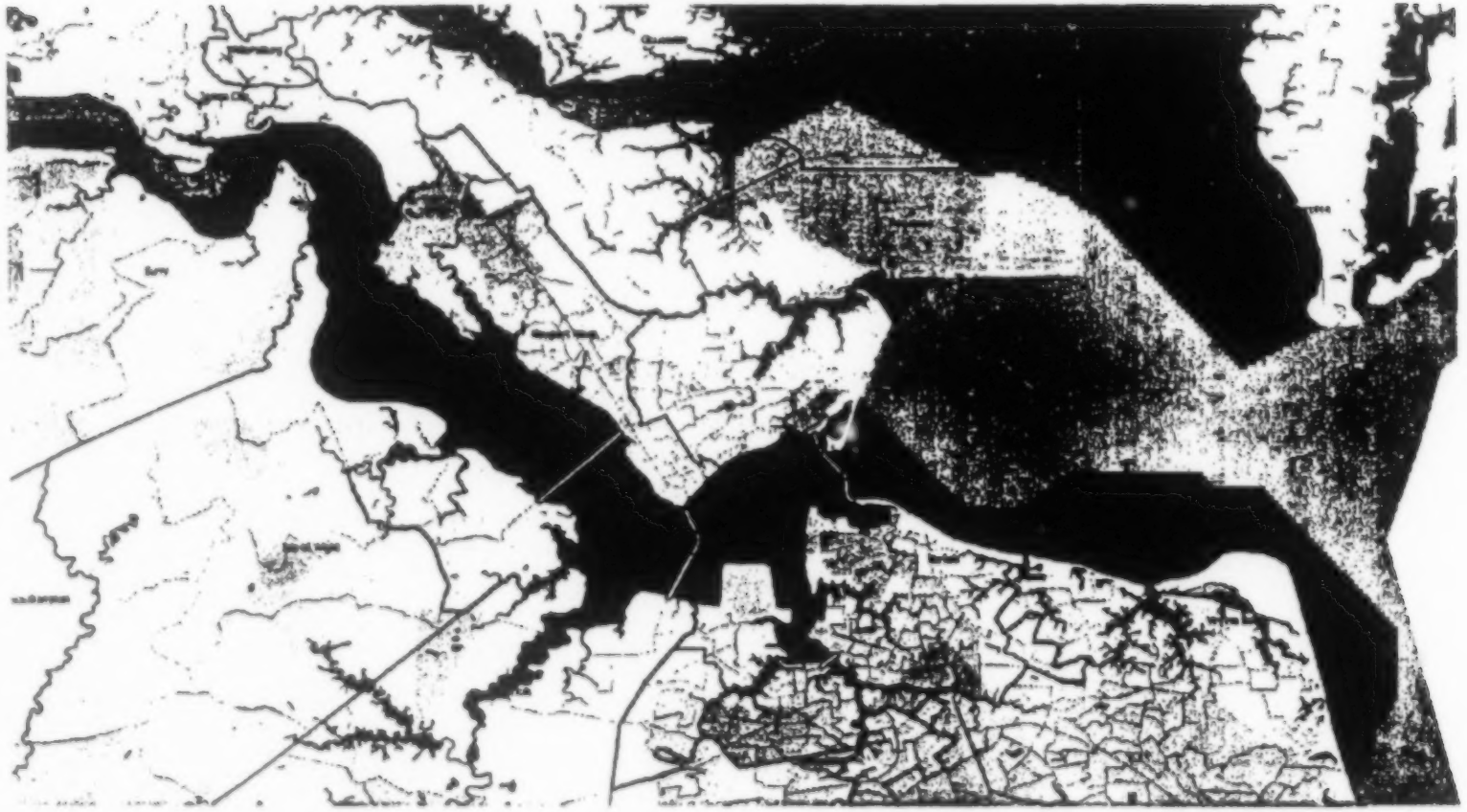
Enacted Congressional District 3 –
Detail with 1991 Boundaries (Green)



Enacted Congressional District 3 –
Detail with Benchmark Boundaries (Red)

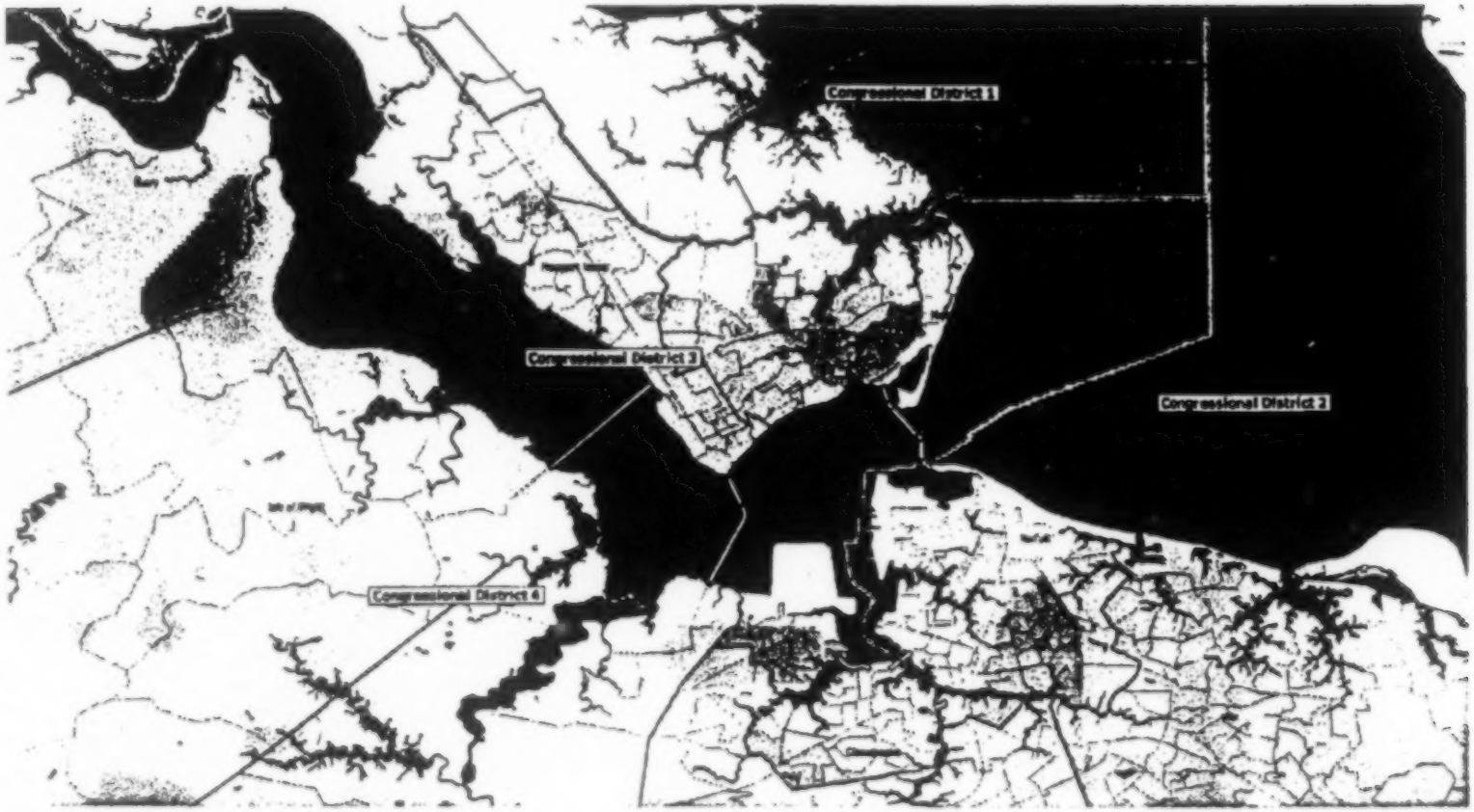


Enacted Congressional District 3 –
Detail with 2011 Proposed Senate Boundaries (Red)



Plaintiffs' Alternative Congressional District 3
(Boundary in Green)

Plaintiffs' Alternative Congressional District 3 – Detail
(Boundary in Green)



Plaintiffs' Alternative Congressional District 3 – Detail
(Boundary in Green)

Population Changes in CD3
1991 - 2012

		1991	1998	2001	2012
CD3	Total Black Population	63.98%	53.59%	56.8%	59.5%
	BVAP	61.17%	50.47%	53.2%	56.3%

Sources: Plaintiffs' Trial Exhibits 6, 20, 22, and 24.

OPENING STATEMENT

THE HONORABLE MARK L. COLE

CHAIRMAN, COMMITTEE ON PRIVILEGES AND ELECTIONS

VIRGINIA HOUSE OF DELEGATES

SUBCOMMITTEE PUBLIC HEARING

HOUSE P&E SUBCOMMITTEE ON REDISTRICTING

NATURAL SCIENCE CENTER, VIRGINIA WESTERN COMMUNITY COLLEGE

ROANOKE, VIRGINIA

WEDNESDAY SEPTEMBER 8, 2010 7:00 P.M.

Ladies and gentleman, colleagues: It's my pleasure tonight to WELCOME everyone to the ***first*** **hearing** of the House of Delegates Redistricting Subcommittee. This is the first of *six opportunities* the Subcommittee will have this year to *gather input* from experts...advocacy groups..., and, *most importantly*, the *people of Virginia* on the every-10-years process of drawing new boundaries for state legislative and congressional districts.

The General Assembly and Governor – as officials who submit to voters at elections and, therefore, are *directly accountable* to the public – are responsible for drawing legislative boundaries. That mandate is clearly spelled out in the Virginia Constitution. This **time-tested and *inclusive* process** ensures that *every Virginian has a VOICE in redistricting* since every Virginian is represented in the General Assembly by a delegate or state senator.

* * *

But again, BEFORE we get involved in the work of line drawing or seeking legal opinions or whatever lees, the Speaker and I, along with our House colleagues, we want to hear from you about ***YOUR*** **PRIORITIES** and ***YOUR*** **SUGGESTIONS** for redistricting.

As we get underway, I believe it is incumbent upon me to articulate – and I hope my House colleagues will agree with – ***my*** **touchstones** on this very important public policy issue.

1) **The redistricting process must be *FAIR*.** It must include opportunity for input from all and serious deliberation about a fair outcome.

2) **The redistricting process must create districts as nearly *EQUAL IN POPULATION AS PRACTICABLE*,** giving effect to the constitutional "one person-one vote" principle.

3) **The final district maps must *COMPLY WITH THE LAW*** – with the U.S. Constitution, the Virginia Constitution, the federal Voting Rights Act, and court decisions applying them.

Within those *critical constraints*, I look forward to learning from everyone giving testimony here tonight and at subsequent hearings.

* * *

From: Chris Marston<chris.marston@gmail.com>

To: Glenn Oder<glennoder@gmail.com>

Subject: Re: Fw: Split Precincts in Congressional Redistricting

Date: 6/1/2011 4:41:26 PM

Attachments:

Glenn,

Janis is pretty Lone Ranger on this one, but I'll send this to him, with a copy to you, indicating that if the conference committee does consider any changes to the plan in HB 5004, other than the big debate between Janis' version and Mamye Locke's, that they should look at this.

Thanks,

Chris

On Wed, Jun 1, 2011 at 1:22 PM, Glenn Oder <glennoder@gmail.com> wrote:

Chris, are you helping with the Janis bill? If so, can we address this concern?

Glenn

---------Forwarded message ---------

From: **Glenn Oder**<DelGOder@house.virginia.gov>

Date: Wed, Jun 1, 2011 at 11:35 AM

Subject: Fw: Split Precincts in Congressional Redistricting

To: Glenn Oder<glennoder@gmail.com>

-----Forwarded by Glenn Oder/HDel/HOD on 06/01/2011 11:35 AM -----

To: jrhgch@verizon.net, delgoder@house.virginia.gov, delbpogge@house.virginia.gov

From: HYDR04U@aol.com

Date: 05/31/2011 12:49 PM

Cc: hydro4u@aol.com

Subject: Split Precincts in Congressional Redistricting

(*See attached file: Hampton Machen Split Precinct Comparison Map.doc*)

Delegates Helsel, Oder, and Pogge,

Request your help in preventing a Hampton Congressional split precinct. As you are aware, split precincts create problems for Voters, Election Boards, and Registrars (not to mention candidates).

The current (Janis) Redistricting Plan splits the Hampton Machen Precinct (210) by picking up two block numbers (2017 and 3022) with a Voting Age Population of 217 into the 3rd Congressional District, while the remainder of the Machen Precinct with VAP of 7,290 is placed in the 2nd Congressional District.

The map line runs down Armistead Avenue, in current and most other plans, where the Janis plan jumps off Armistead to pick up these two blocks and then immediately back to continue down Armistead. (Please see attached map.)

I understand the complexities of Redistricting in Virginia, but it seems to me the potential deviation created by 217 voters is minimal compared to the

expenses and confusion created by split precincts for the next 10 years.

Thank you for your consideration.

(Note: I mentioned this previously to Glenn and Gordon. Glenn asked me to send this email.)

Carl Anderson

Chairman,

Republican Party of Hampton

City Committee

Chris Marston

571-482-7690 703-997-2546 (fax)

state_ab	county_name	town_name	precinct_number	precinct	PA2014	BENCH_CD3	cd2012
VA	NORFOLK	NORFOLK	415	415 – UNITED WAY	2	3	3
VA	NORFOLK	NORFOLK	501	501- BAYVIEW	2		2
VA	NORFOLK	NORFOLK	503	503 – EAST OCEAN VIEW	2		2
VA	NORFOLK	NORFOLK	504	504 – LARRYMORE	2		2
VA	NORFOLK	NORFOLK	505	505 – LITTLE CREEK	2		2
VA	NORFOLK	NORFOLK	506	506 – OCEAN VIEW CENTER	2		2
VA	NORFOLK	NORFOLK	507	507 - PRETLOW	2		2
VA	NORFOLK	NORFOLK	509	509 -	2		2

state_ab	county_name	town_name	precinct_number	precinct	PA2014	BENCH_CD3	cd2012
				TARRALLTON			
VA	NORFOLK	NORFOLK	509	509 – TARRALLTON 2	2		2
VA	NORFOLK	NORFOLK	510	510 – THIRD PRESBYERIAN	2		2
VA	NORFOLK	NORFOLK	511	511 - CROSSROADS	2		2
VA	NORFOLK	NORFOLK	512	512 – AZALEA GARDENS	2		2
VA	PETERSBURG	PETERSBURG	101	101 – FIRST WARD FIRST PRECINCT	3	3	3
VA	PETERSBURG	PETERSBURG	201	201 – SECOND	3	3	3

state_ab	county_name	town_name	precinct_number	precinct	PA2014	BENCH_CD3	cd2012
				WARD FIRST PRECINCT			
VA	PETERSBURG	PETERSBURG	301	301 – THIRD WARD FIRST PRECINCT	3	3	3
VA	PETERSBURG	PETERSBURG	401	401 –FOURTH WARD FIRST PRECINCT	3	3	3
VA	PETERSBURG	PETERSBURG	501	501 – FIFTH WARD FIRST PRECINCT	3	3	3
VA	PETERSBURG	PETERSBURG	601	601 – SIXTH WARD FIRST PRECINCT	3	3	3
VA	PETERSBURG	PETERSBURG	701	701 – SEVENTH WARD FIRST	3	3	3

state_ab	county_name	town_name	precinct_number	precinct	PA2014	BENCH_CD3	cd2012
				PRECINCT			
VA	PORTSMOUTH	PORTSMOUTH	1	001 - ONE	2	3	3
VA	PORTSMOUTH	PORTSMOUTH	5	005 – FIVE	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	7	007 – SEVEN	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	9	009 – NINE	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	9	009 – NINE	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	10	010 – TEN	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	11	011 – ELEVEN	3	3	3

state_ab	county_name	town_name	precinct_number	precinct	PA2014	BENCH_CD3	cd2012
VA	PORTSMOUTH	PORTSMOUTH	13	013 – THIRTEEN	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	14	014 – FOURTEEN	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	16	016 – SIXTEEN	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	17	017 – SEVENTEEN	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	19	019 – NINETEEN	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	20	020 – TWENTY	3	3	3
VA	PORTSMOUTH	PORTSMOUTH	21	021 – TWENTY-ONE	3	3	3

Enacted Plan

Mr. Morgan's Original Table

55% Democratic VTDs

Enacted Plan

	In Enacted District 3	In Enacted District 3 and Benchmark District 3	In Enacted District 3 But Not Benchmark District 3	In Localities Adjacent To Enacted District 3
Number of VTDs at least 55% Democratic	189	166	23	116
Average Democrat Vote	80.9	81.6	75.6	65.4
Average NH BVAP Percentage	59.5	60.7	50.8	43.5

Mr. Morgan's Corrected Table
(With Additional Column)
55% Democratic VTDs
Enacted Plan

	In Enacted District 3	In Enacted District 3 and Benchmark District 3	In Enacted District 3 But Not Benchmark District 3	In Localities Adjacent To Enacted District 3	In Benchmark District 3 But Not Enacted District 3
Number of VTDs at least 55% Democratic	189	159	30	116	5
Average Democrat Vote	80.9	81.4	77.9	65.4	58.7
Average NH BVAP Percentage	59.5	60.0	57.0	43.5	21.1

Alternative Plan

Mr. Morgan's Original Table

55% Democratic VTDs

Enacted Plan

	In Alternative District 3	In Alternative District 3 and Benchmark District 3	In Alternative District 3 But Not Benchmark District 3	In Localities Adjacent To Alternative District 3
Number of VTDs at least 55% Democratic	160	136	24	145
Average Democrat Vote	80.6	81.9	73	68.8
Average NH BVAP Percentage	59.8	61.6	49.3	46.4

Mr. Morgan's Corrected Table

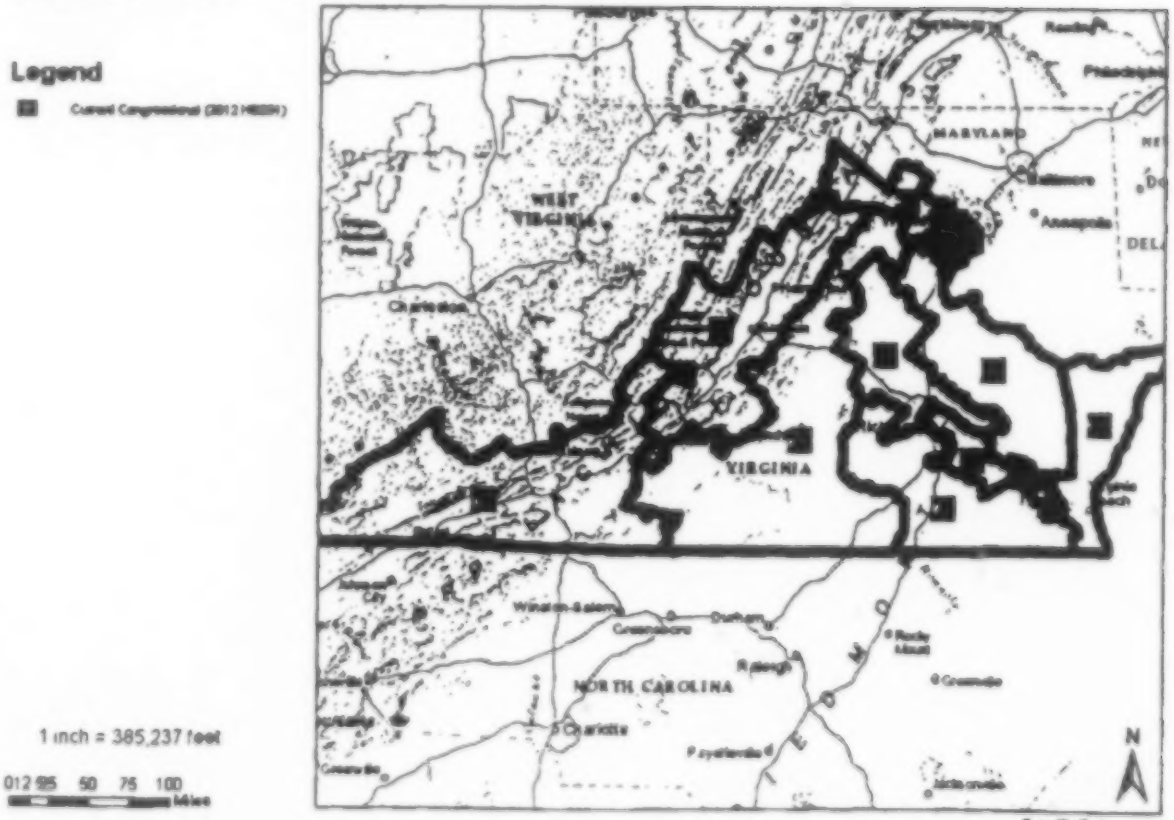
(With Additional Column)

55% Democratic VTDs

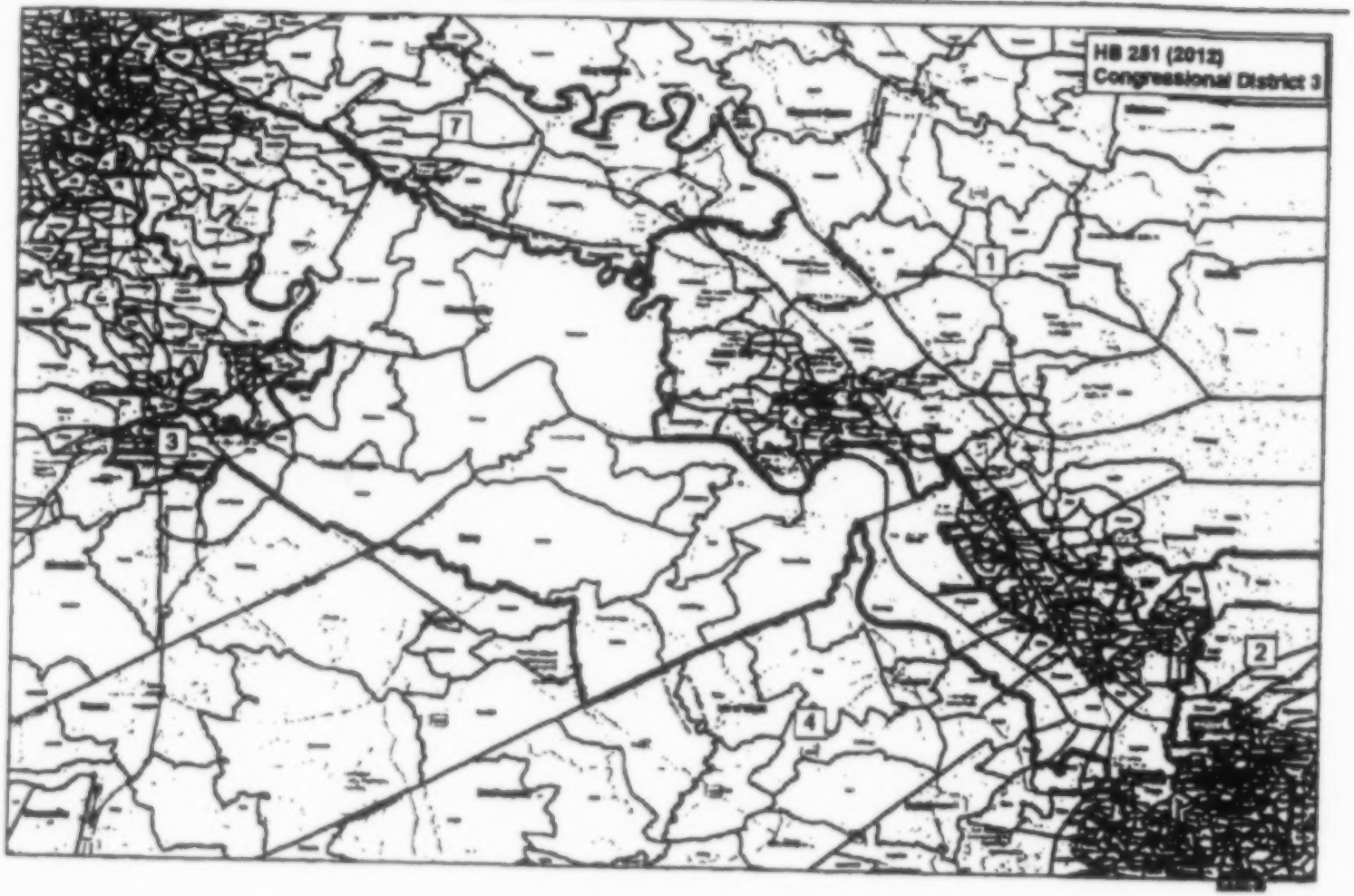
Enacted Plan

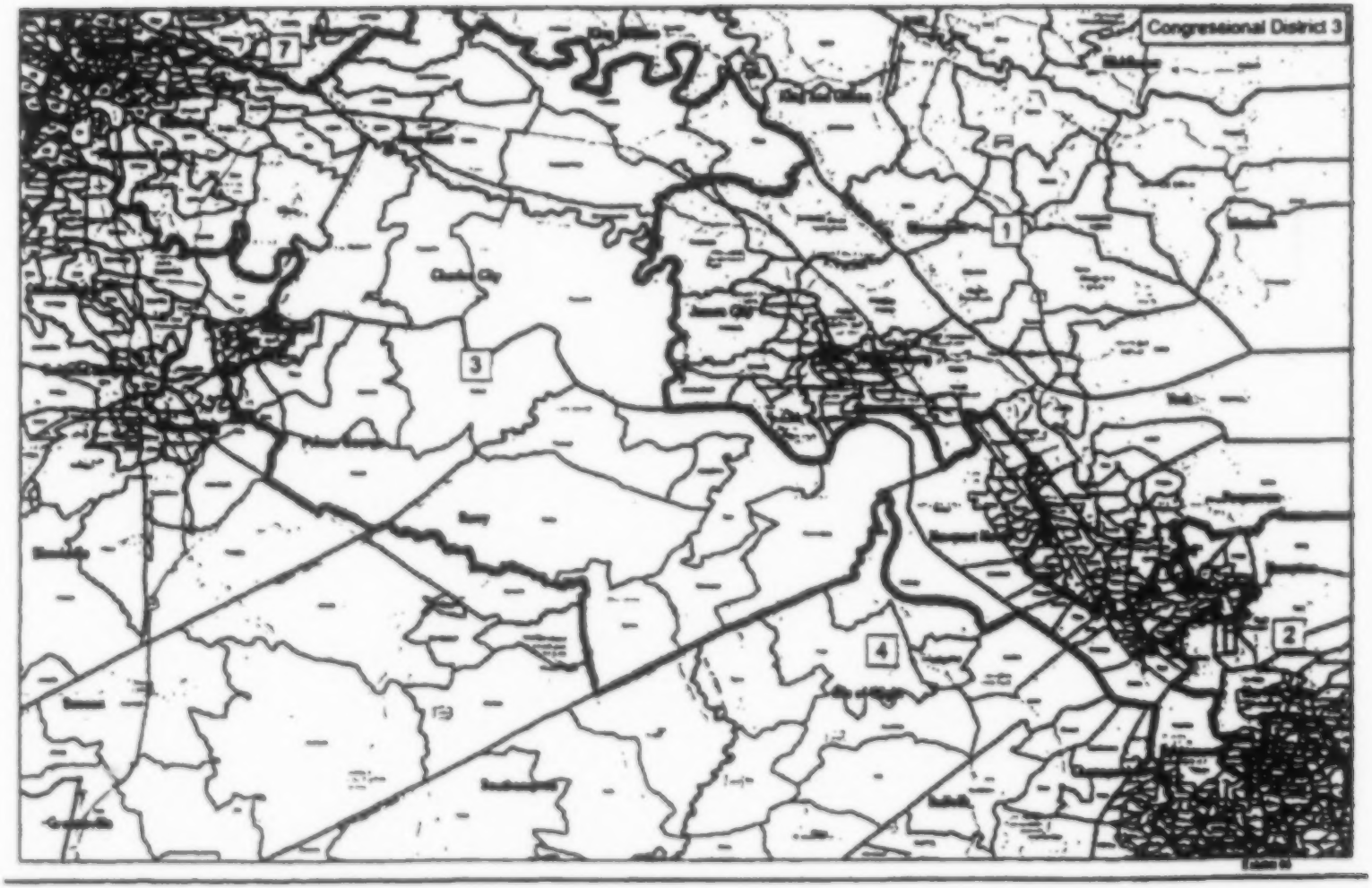
	In Alternative District 3	In Alternative District 3 and Benchmark District 3	In Alternative District 3 But Not Benchmark District 3	In Localities Adjacent To Alternative District 3	In Benchmark District 3 But Not Alternative District 3
Number of VTDs at least 55% Democratic	160	129	31	145	35
Average Democrat Vote	80.6	81.7	75.8	68.8	77.1
Average NH BVAP Percentage	59.8	60.7	55.7	46.4	51.8

COMMONWEALTH OF VIRGINIA
DIVISION OF LEGISLATIVE SERVICES-REDISTRICTING 2010



Int.-Def.'s
Exhibit 02


HB 281 (2012)
Congressional District 3
7
1
3
2
4


Congressional District 3
7
1
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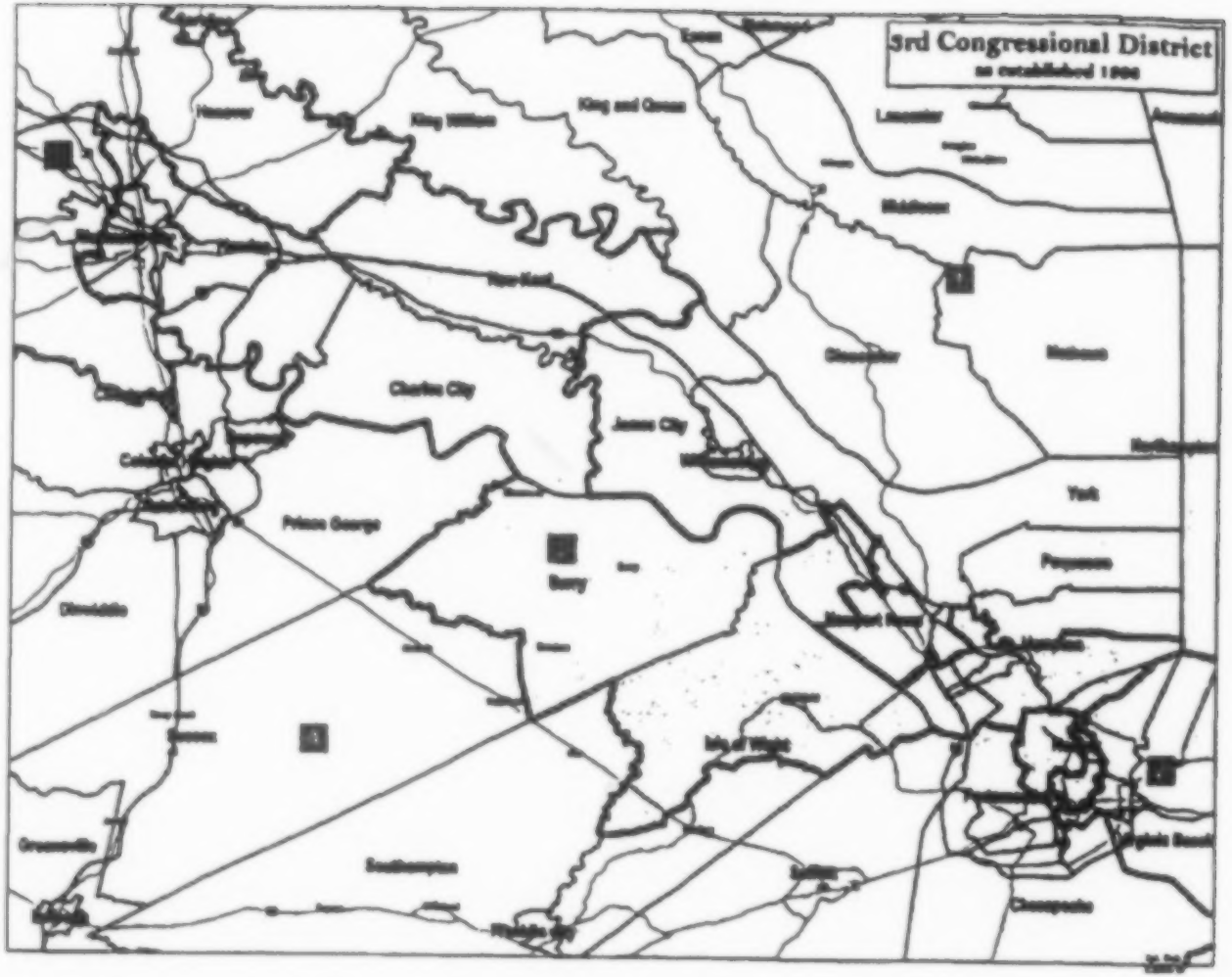
3rd Congressional District
as established 1906
King William
King and Queen
New Kent
Charles City
James City
Prince George
Surry
Isle of Wight
Southampton
Chesapeake

IN THE MATTER OF
THE COMMITTEE ON PRIVILEGES AND ELECTIONS

Notice of Public Meeting for House Bill No. 5004
Amendment in the Nature of a Substitute

BEFORE:	JANET HOWELL, CHAIRPERSON
PLACE:	COMMONWEALTH OF VIRGINIA VIRGINIA STATE CAPITOL CAPITOL SQUARE EAST GRACE STREET RICHMOND, VIRGINIA 23219
DATE:	APRIL 12, 2011
REPORTER:	LANIEDA D. BRIGGS, CSR and Notary Public.
PANEL:	JANET HOWELL, 32nd Senate District STEPHEN MARTIN, 11th Senate District R. CREIGH DEEDS, 25th Senate District MARY MARGARET WHIPPLE, 31st Senate District PHILLIP P. PUCKETT, 38th Senate District JOHN S. EDWARDS, 21st Senate District DONALD A. MCEACHIN, 9th

Senate District

CHAP PETERSEN, 34th Senate District

PANEL MEMBERS Continued:

GEORGE BARKER, 39th Senate District

RALPH S. NORTHAM, 6th Senate District

JEFFREY L. MCWATERS, 8th Senate District

JILL HOLTZMAN VOGEL, 27th Senate District

RALPH SMITH, 22nd Senate District

HARRY B. BLEVINS, 14th Senate District

MARK D. OBENSHAIN, 26th Senate District

SPEAKERS:

DELEGATE BILL JANIS

SENATOR MAMIE E. LOCKE

PRESENT:

D. HOBIE LEHMAN, Assistant Coordinator of Committee Operations/Sergeant-At-Arms

PROCEEDINGS

- - - - -

MADAM CHAIR: The Committee for Privileges and Elections will come to order. The clerk will call the role.

THE CLERK: Senator Martin.

SENATOR MARTIN: Here.

THE CLERK: Senator Deeds.

SENATOR DEEDS: Here.

THE CLERK: Senator Whipple.

SENATOR WHIPPLE: Here.

THE CLERK: Senator Obenshain.

SENATOR OBENSHAIN: Here.

THE CLERK: Senator Puckett.

SENATOR PUCKETT: Here.

THE CLERK: Senator Edwards.

SENATOR EDWARDS: Here.

THE CLERK: Senator Blevins.

SENATOR BLEVINS: Here.

THE CLERK: Senator McEachin.

SENATOR MCEACHIN: Here.

THE CLERK: Senator Petersen.

SENATOR PETERSEN: Here.

THE CLERK: Senator Smith.

SENATOR SMITH: Here.

THE CLERK: Senator Barker.

SENATOR BARKER: Here.

THE CLERK: Senator Northam.

SENATOR NORTHAM: Here.

THE CLERK: Senator Vogel.

Senator McWaters.

SENATOR MCWATERS: Here.

THE CLERK: Senator Howell.

SENATOR HOWELL: Here.

THE CLERK: Madam Chair, you have the floor.

MADAM CHAIR: The House has communicated House Bill 5004 dealing with congressional redistricting and Delegate Janis is here.

Delegate, would you like to present your bill?

DELEGATE JANIS: Yes, Ma'am. Thank you.

Thank you, Madam Chair, members of the committee.

House Bill 5004 is the legislation that will effectuate the constitutionally mandated reapportionment of districts for the congressional delegation for all of the eleven Virginia congressional districts currently in law.

The boundary lines in House Bill 5004 were drawn based on several criteria. The first criteria that we applied was that the districts must be drawn to conform with the mandates of the United States Constitution and the Virginia Constitution, and specifically to comply to the one person one vote rule that's contained in both places.

This is a significant challenge given the dramatic population shifts that we have seen over the last ten years which were non-uniform, and specifically to the

dramatic population increase in Northern Virginia at a corresponding time when you had corresponding losses in the population on the south side and southwest.

Secondly, the districts are drawn to conform with all mandates of all applicable federal law and all Supreme Court precedent that's on point.

So, specifically, the Voting Rights Act mandates that there be no retrogression in minority voter influence in the third congressional district and is the only minority/majority district currently in existence under the current lines.

So that was one of the criteria that was mandatory and then we also drew it to comply with the federal mandate which would be a zero variance in these districts.

And what the zero variance means is that each of the eleven congressional districts must be drawn so as to encompass no fewer than 727,365 residents, but no more than 727,366 residents. One person variance.

Third, the districts are drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 congressional elections. So the territory of the districts are based on the core of the existing congressional districts.

What I attempted to do was with the minimum amount of change or disruption try to keep the core of the districts consistent with the existing corners. So you will see the lines don't change very much. They have to change obviously because of the population shifts, but we tried to make those changes as with

the least amount of disruption to continuity or representation as possible.

The plan does not cut currently elected congressman out of their current districts. Nor does it presume to lump current congressmen together in single districts so that they would have to compete against each other.

What this plan simply does is it tries to respect the results of the last election cycle. You'll also note that the plan attempts wherever possible to stay consistent with the constitutional mandates and federal law mandates to keep counties, cities, and towns intact.

And not only to keep jurisdictions in the localities intact, but reunite wherever possible existing split jurisdictions, counties, cities, or towns. You will note there are three counties: Allegheny runs within Caroline, and one city, the city of Covington, reunited in a single congressional district under this plan.

In fact, House Bill 5004 splits fewer jurisdictions in the current congressional district lines.

We also tried to wherever possible consistent with the population shifts and the constitutional and federal law mandates, try to keep intact local communities of interest, and to reunite wherever possible communities of interest that have been split in previous redistricting plans. Reston and Northern Virginia would be the primary examples of a community of interest if you are looking at what that sort of means.

It's not a county, city, or town, but most folks in that region would think that they have some sort of a commonality of interest.

We reunite Reston under this plan. We try to do the same thing, not only hold harmless existing local communities of interest, but reunite some that have been split in previous plans.

Finally, the district boundary lines were drawn based in part on specific and detailed recommendations I received from each of the eleven members currently elected to congress, both Republican and Democrat.

We tried to get input from them as to how best to draw the boundaries in order to preserve the local communities of interest within their district. And so each congressman provided specific, detailed, and significant recommendation as to how the lines of their district should be drawn.

And so that we could meet the 727,365 benchmark with the least amount of disruption and continuity of representation of constituent service.

I've spoken with each member of the Virginia Congressional Delegation, Republican and Democrat, last Thursday, shown them House Bill 5004 and left them a copy, showed them a map of the lines as reflected in 5004.

And each member of the congressional delegation both republican and democrat has told me that the lines in 5004 conform to the recommendations that they have provided me, and they support the lines for how their district is drawn.

I didn't get an opinion from any of them as to the entire plan in its totality, but rather, asked each specific member whether or not the lines for their district conform generally with the recommendations they had provided. And they each said that they

could support the lines in this plan as they are currently drawn vis-a-vis their district.

Without any further delay, I'm going to be happy to answer any questions that you may have.

MADAM CHAIR: Are there any questions for Delegate Janis? Senator Obenshain.

SENATOR OBENSHAIN: Delegate, to the extent you have not already itemized the matters in which you believe this to be or not to be a bipartisan plan, would you elaborate on that?

Perhaps I have not checked to see the extent to which it had any bipartisan support in the House, but could you comment on that, the nature of the—bipartisan nature of this plan.

DELEGATE JANIS: I could tell you we just passed the bill out of the House. We have a rule that we are not supposed to talk about what we do down the hall in the senate. I am not sure if you have a rule about that. It passed with 71 yes votes in the House.

SENATOR OBENSHAIN: Madam Chair?

MADAM CHAIR: Senator Obenshain.

SENATOR OBENSHAIN: This is a plan in which you consulted republicans and democrats drawing it?

DELEGATE JANIS: Yes.

SENATOR OBENSHAIN: Consulted all republican and democratic representatives in congress?

DELEGATE JANIS: I met with each congressmen, both the republicans and the democrats, all eleven of them, and each member of congress, Republican and

Democrat on Thursday when I showed them the total map and a section of this drawing before you with two technical exceptions that—two technical amendments that we made subsequently.

And each member of the congressional delegation, republican and democrat, said that they support the lines for their district as they are drawn in this.

SENATOR OBENSHAIN: Can you –

MADAM CHAIR: Senator Obenshain.

SENATOR OBENSHAIN: Thank you. Madam Chairman.

Can you also comment on the length of time that this map has been available for public inspection or a version of it?

DELEGATE JANIS: Well, I introduced the legislation last Wednesday, so Legislative Services turned the map around pretty quickly. So my understanding was it was not online Wednesday. but by Thursday this map was available for public review online as of last Thursday.

SENATOR OBENSHAIN: Have you received public comment upon the map?

DELEGATE JANIS: I would say we had hearings both last year and this year where we gave the public notice, an opportunity to be heard, and what we were particularly keen on was in these public hearings, the public—these public hearings were advertised as being for comment on the Virginia Senate Plan, the Virginia House of Delegates Plan, and the Congressional District Plan.

We hadn't had a hearing subsequent but we did have a hearing for the Virginia Elections Committee

and the House of Delegates where the public was given notice and an opportunity to be heard, and that meeting was scheduled I think last Wednesday. So the meeting was held yesterday, so we gave the required notice and opportunity to be heard to the public.

On this specific plan we also took public comment in previous meetings both last year and this spring.

MADAM CHAIR: This morning when we were meeting, I handed out a report of all of the public comments on the various plans so that would be in that report.

Senator Deeds.

SENATOR DEEDS: I'm curious. I'm looking at districts two, three, and four, and am I correct that this District 2 kind of wraps around the point there, Hampton Roads, and comes down the Elizabeth River and picks up portions, looks like the cities of Norfolk, and maybe it picks up part of the city of Norfolk on both sides, or at least on that side of the Elizabeth River. It kind of wraps around that point?

DELEGATE JANIS: That's correct.

SENATOR DEEDS: Senator –

MADAM CHAIR: Yes, Senator Deeds.

SENATOR DEEDS:—several weeks ago I read a report in Politico that indicated that the congress people, the eleven had come to an agreement, and then the Cook Report published a map that was eerily close to this. So is that, is this—would you agree that this map is pretty close to the one that the reports indicated the congress people had agreed to several weeks ago?

DELEGATE JANIS: I can tell you, I didn't read the Cook Report. I didn't read any of the blogs on it. So I wouldn't want to offer an opinion. If you want to characterize it as being similar, I'm not competent to give an answer on that. All I know is where the lines are. I didn't read any of the blog commentary.

SENATOR DEEDS: Okay. Thanks.

MADAM CHAIR: Senator Petersen.

SENATOR PETERSEN: Delegate Janis, you said you spoke with the eleven congressional representatives, and they approve of this plan, at least to their own districts.

DELEGATE JANIS: I want to be very precise, vis-a-vis the lines of their specific district. They approved the line of their specific district. I didn't ask as to whether or not if any of them supported the plan in its totality.

SENATOR DEEDS: Did you speak with anyone who plans to run against those incumbents as to what their position was as to this plan?

DELEGATE JANIS: No, I didn't.

SENATOR DEEDS: Do you have any knowledge as to how this plan improves the partisan performance of those incumbents in their own district?

DELEGATE JANIS: I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district.

MADAM CHAIR: Senator Petersen.

SENATOR PETERSEN: Further question. The plan we have before us, was that plan presented to

you or is this something that you put together yourself?

DELEGATE JANIS: The plan is my piece of legislation.

MADAM CHAIR: Senator Petersen.

SENATOR PETERSEN: That's not quite my question, delegate. Did someone else present this plan to you?

DELEGATE JANIS: I had assistance in drawing it up, because..., I didn't sit at the computer and actually draw the lines. I'm not competent to do maptitude, but I had staff assistance to do it.

SENATOR PETERSEN: That's all I have.

MADAM CHAIR: Are there any further questions?

Would anyone in the audience like to speak to House Bill 5004? I see no one coming forward. There is an amendment in the nature of substitute that Legislative Services has.

SENATOR DEEDS: I have—I move to adopt the amendment nature of the substitute.

UNIDENTIFIED SPEAKER: Second.

MADAM CHAIR: It's been moved and seconded that the amendment in the nature of a substitute be adopted. All in favor please say, yea.

(Yea responses heard.)

MADAM CHAIR: Any opposed?

SENATOR OBENSHAIN: Where is it?

MADAM CHAIR: It's coming.

SENATOR OBENSHAIN: Well, can we wait until it comes around?

MADAM CHAIR: Yes, we can wait. Just by way of explanation, the amendment in the nature of a substitute is now the Locke plan that we discussed this morning. It is my understanding it's identical to the Locke plan that we discussed this morning.

SENATOR OBENSHAIN: That was the question I was going to ask. What were we voting on?

MADAM CHAIR: Senator Obenshain.

SENATOR OBENSHAIN: Madam Chairman, in light of some of the questions asked of Delegate Janis, may I ask Senator Locke a couple of follow-up questions?

MADAM CHAIR: Yes, but I believe we should adopt the substitute first.

SENATOR DEEDS: We have a motion.

MADAM CHAIR: We have a motion on the floor to adopt the substitute, and then you can ask questions.

SENATOR OBENSHAIN: Well, I mean, are we—well, I mean, my questions relate to whether I want to adopt the substitute.

MADAM CHAIR: Could you withdraw your motion?

SENATOR DEEDS: I withdraw the motion, sure.

MADAM CHAIR: And the substitute. Okay.

SENATOR MARTIN: Observe parliamentary, real quick.

MADAM CHAIR: Senator Martin.

SENATOR MARTIN: Is it not appropriate when a motion is made that questions can go to that motion. I don't think he has to –

MADAM CHAIR: At this point there is no motion, so he can. There might have been, but there is none.

SENATOR MARTIN: Okay.

MADAM CHAIR: Senator Obenshain.

SENATOR OBENSHAIN: If I may, Senator Locke, your map for your plan, was that released last week?

SENATOR LOCKE: It was released after I introduced the bill which was yesterday.

SENATOR OBENSHAIN: Was the map released yesterday or the map released today?

Do you know when the map was made available for the public to see?

SENATOR LOCKE: After I introduced the bill.

SENATOR OBENSHAIN: Did you consult with all eleven members of the congressional delegation of republicans and democrats in crafting your bill?

SENATOR LOCKE: No. I did not, no.

SENATOR OBENSHAIN: Did you consult with members of the minority, the republicans and the senate in an effort to make your bill bipartisan?

SENATOR LOCKE: No, I did not.

SENATOR OBENSHAIN: Is there anything –

MADAM CHAIR: Senator Obenshain.

SENATOR OBENSHAIN:—is there anything about your bill that you can reference or any efforts that you can point us to that you made to make your bill reflective of a bipartisan effort at all?

SENATOR LOCKE: My efforts, senator, as you are well aware, was to increase or to have a second minority district. That was my purpose as had been

indicated by the Virginia Legislative Black Caucus several weeks ago, and we indicated then that we would be looking at the third and the fourth as the districts where we would be making said changes.

So it wasn't done in secret. You know, there was nothing done to remove any legislator from his district. So it wasn't as though we were doing this on the sly.

SENATOR OBENSHAIN: Madam Chairman?

MADAM CHAIR: Are you finished, Senator Locke?

SENATOR LOCKE: Yes.

MADAM CHAIR: Senator Obenshain.

SENATOR OBENSHAIN: Madam Chairman, when you indicate that it was done not in secret, were there any meetings of your group or your working group that were advertised or notice given to any member of the committee for the general public so we could participate and make comments in the process?

SENATOR LOCKE: No, there was not.

SENATOR MCEACHIN: Madam Chair?

MADAM CHAIR: Senator McEachin.

SENATOR MCEACHIN: Just a comment, especially as to Senator Obenshain's last question. I would submit that the same amount of publicity and public comment has been afforded this plan as every other plan that has been put forward in this year's redistricting process.

And indeed having been a veteran of prior redistricting, particularly '01, I would submit to you

there has been more public input in this congressional redistricting plan both of Delegate Janis's as well as Senator Locke's than there was in 2001.

SENATOR OBENSHAIN: Madam Chair?

MADAM CHAIR: Senator Obenshain and then Senator Martin.

SENATOR OBENSHAIN: I don't want to engage anyone in debate.

M .DAM CHAIR: No, we won't.

SENATOR OBENSHAIN: I would simply say that with the previous plans and with the Janis plan at least I had a day, or two days, or three days to actually look at it, analyze it, and figure out what they were proposing.

This plan, I didn't see the map until today, and I know the bill was introduced yesterday, but you know, it just has not provided a meaningful opportunity for me as a legislator to be able to digest and to analyze what really is the full scope of the proposal. I mean, so those are the purposes of my comments.

MADAM CHAIR: Senator Martin.

SENATOR MARTIN: I would just observe, Madam Chairman, that the assertion has as much visibility and ability for public comment as any other proposal and is not possible in light of the fact that it has just been released yesterday afternoon at the earliest, if it was then, and where others have had some days and in some instances a week plus to review. So thank you, Madam Chairman.

MADAM CHAIR: Thank you.

Senator Edwards.

SENATOR EDWARDS: I have a question for Senator Locke. I think this was raised either when we were dealing with your plan in the senate, your senate bill, as opposed to the substitute, but what is the percentage of African Americans in Virginia in the population?

SENATOR LOCKE: 20 percent.

SENATOR EDWARDS: How much?

SENATOR LOCKE: About 20 percent.

SENATOR EDWARDS: About 20 percent. On a pro rata basis how many districts should be African American majority or influence –

MADAM CHAIR: Can you speak a little louder, please?

SENATOR EDWARDS: Yes. How many districts should be African American influenced than on a pro rata basis would that call for?

SENATOR LOCKE: Two plus.

SENATOR EDWARDS: Two plus. And your district provides for how many?

SENATOR LOCKE: Two.

SENATOR EDWARDS: Two. Okay. Thank you.

MADAM CHAIR: All right. I don't see any further hands.

SENATOR DEEDS: I move we adopt the amendment nature of the substitute.

UNIDENTIFIED SPEAKER: Second.

MADAM CHAIR: It's been moved and seconded that the amendment in the nature of a substitute be adopted.

Any further comments? All in favor please say, yea.

(Yea responses are heard.)

* * *

[Page 23]

MADAM CHAIR: The motion passes to adopt on nine yeas, six nays.

SENATOR DEEDS: Madam Chair?

MADAM CHAIR: Senator Deeds.

SENATOR DEEDS: I now move that we support the bill as amended.

UNIDENTIFIED SPEAKER: Second.

MADAM CHAIR: It's been moved and seconded that the bill be reported—the bill as amended be reported. Is there anyone—

UNIDENTIFIED SPEAKER: Second.

MADAM CHAIR: I thought it was seconded.

UNIDENTIFIED SPEAKER: Second, right here. I'm sorry.

MADAM CHAIR: Okay. It has been seconded.

All right. Is there anyone in the audience who would like to speak to this motion?

Seeing no one, does anyone on the committee wish to make a comment?

Hearing no one, let's have the vote to report the committee amendment in the nature of a substitute.

Clerk, call the role.

* * *

[Page 25]

THE CLERK: Nine yeas, six nays.

MADAM CHAIR: The bill is reported nine yes, six no.

DELEGATE JANIS: Thank you, chairman.

MADAM CHAIR: Thank you, delegate.

There being no more business, the committee will rise.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAWN CURRY PAGE, et al.,	)	
	)	Civil Action
Plaintiffs,	)	No. 3:13-cv-678
v.	)	
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	
Defendants.	)	

PLAINTIFFS' NOTICE OF FILING OF ALTERNATIVE CONGRESSIONAL REDISTRICTING PLAN

Pursuant to the Court's directive during the scheduling conference on January 28, 2014, Plaintiffs hereby submit their Alternative Congressional Redistricting Plan (the "Alternative Plan"). Plaintiffs are submitting this Plan as their proposed alternative to Virginia's enacted Congressional redistricting plan (the "Enacted Plan") that is the subject of Plaintiffs' claims.

As demonstrated in the accompanying exhibits, the Alternative Plan changes only two congressional districts ("CD") in the Enacted Plan – CD 2 and CD 3. The Alternative Plan remedies the unlawful racial gerrymander in CD 3 by eliminating the splits in the

Enacted Plan in Hampton, Newport News, Norfolk, and Portsmouth. Eliminating these splits moves 132,745 people from CD 3 into CD 2 and moves the same number of people from CD 2 into CD 3. In all other respects, the Alternative Plan is the same as the Enacted Plan.

The exhibits provided with this Notice include a map of the entire Alternative Plan (Exhibit A), a map showing just Alternative CDs 2 and 3 (Exhibit B), and a map that focuses on just Alternative CD 3 (Exhibit C). In addition, Plaintiffs are providing a statistical table showing the racial composition of each of the congressional districts in the Alternative Plan (Exhibit D), reported as both total population and voting age population. As reflected in the table, CDs 2 and 3 are the only districts in the Alternative Plan that have a change in racial composition from the Enacted Plan.

Dated: February 4, 2014

Respectfully submitted,

By /s/

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EXHIBIT A

Page Plaintiffs' Alternative Congressional Redistricting Plan

EXHIBIT B

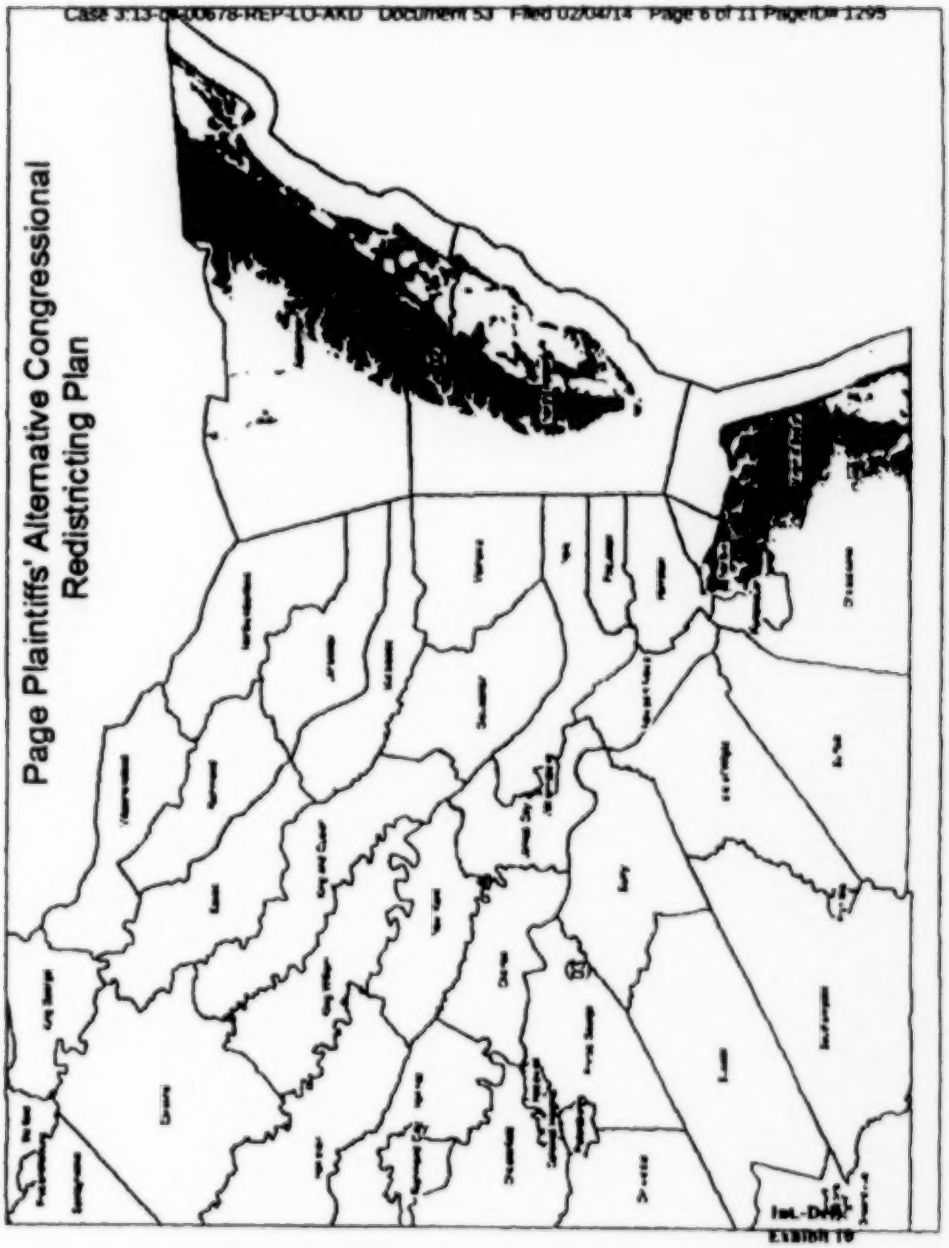
Case 3:13-cv-00678-REP-LO-AKD Document 53 Filed 02/04/14 Page 6 of 11 PageID# 1295
Page Plaintiffs' Alternative Congressional Redistricting Plan

EXHIBIT C

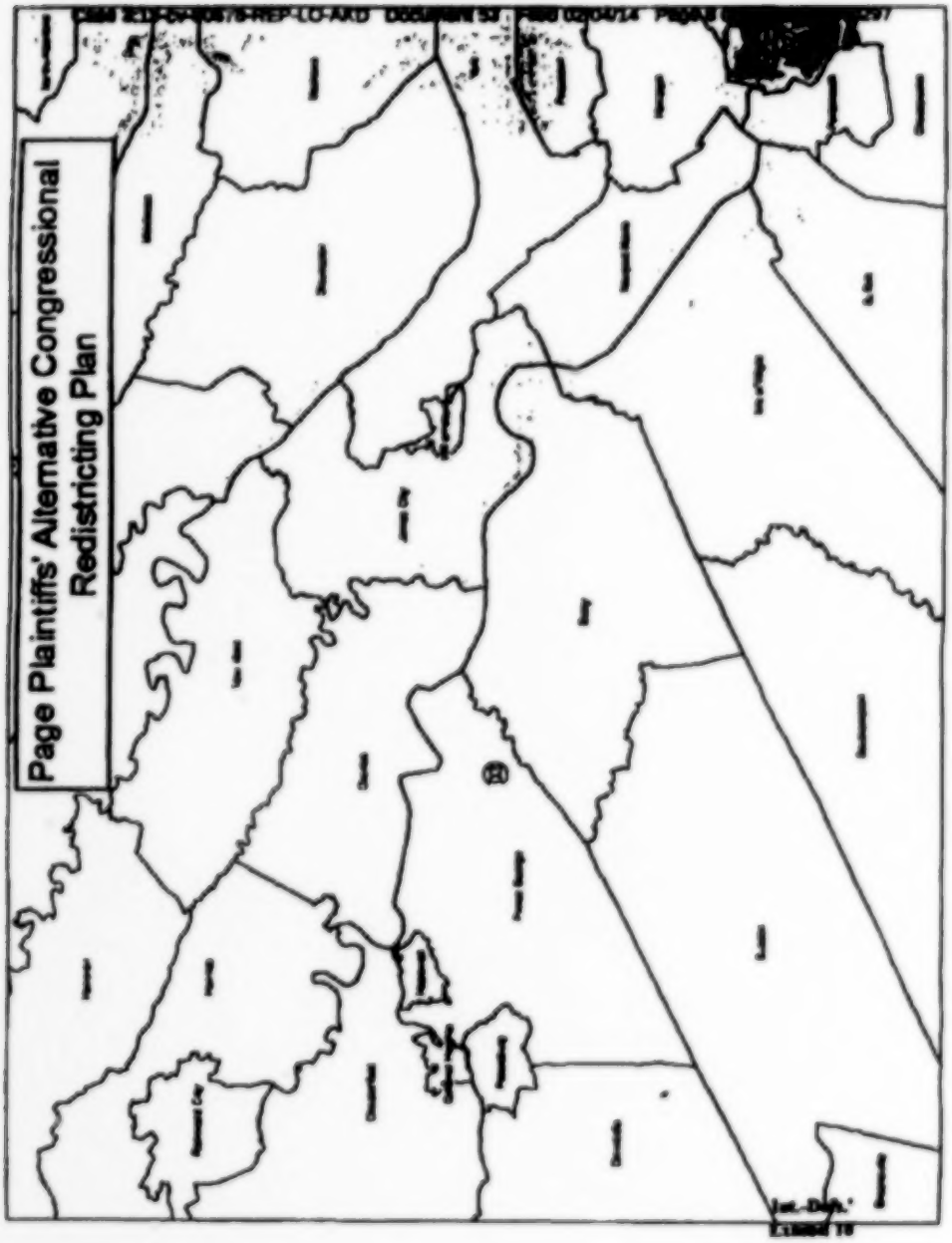
Page Plaintiffs' Alternative Congressional Redistricting Plan

EXHIBIT D

CD	Total Population	Deviation	Black alone or in Combin-ation	Black alone or in Combin-ation (Age 18+)	Hispanic Origin	Hispanic Origin (Age 18+)	Asian alone or in Combin-ation	Asian alone or in Combin-ation (Age 18+)
1	727366	0	18.5%	17.3%	8.4%	7.2%	4.4%	4.0%
2	727366	0	30.1%	27.8%	6.7%	5.9%	6.2%	5.9%
3	727366	0	54.3%	51.0%	5.3%	4.6%	2.7%	2.8%
4	727366	0	33.0%	31.7%	4.7%	4.0%	2.7%	2.5%
5	727365	-1	21.5%	20.5%	3.2%	2.6%	1.9%	1.8%
6	727366	0	11.9%	10.7%	4.3%	3.5%	1.8%	1.6%
7	727366	0	15.7%	14.9%	5.1%	4.3%	4.8%	4.4%
8	727366	0	15.1%	14.1%	18.6%	17.0%	12.8%	12.4%
9	727366	0	5.6%	5.2%	1.9%	1.6%	1.4%	1.4%
10	727365	-1	7.9%	7.3%	11.7%	10.6%	13.7%	12.9%
11	727366	0	13.9%	12.7%	17.0%	15.5%	19.4%	18.8%

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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REPORT OF JOHN B. MORGAN REGARDING PLAINTIFFS' ALTERNATIVE PLAN AND THE ENACTED PLAN

Page v. State Board of Elections

Background Information

My name is John B. Morgan. I have been retained by the defendants to offer an expert opinion regarding Plaintiffs' Alternative Plan and the Enacted Plan. I hold a B.A. in History from the University of Chicago. As detailed in my CV, attached as Exhibit A, I have extensive experience in the field of redistricting, working on redistricting plans in the redistricting efforts following the 1990 Census, the 2000 Census, and the 2010 Census. I have testified as an expert witness in demographics and redistricting. I am being compensated at a rate of $250 per hour for my services in this case.

In preparing this analysis, I considered the following: the legal briefs submitted to the court, reports by Dr. Michael McDonald and Dr. Thomas Brunell, court cases mentioned in the briefs and reports, relevant portions of the Sec. 5 preclearance submissions to the Department of Justice, various maps and datasets from the current and previous congressional districts, the Plaintiffs' Alternative Plan maps and data, the 2010 redistricting PL94-171 data and Census geography data from the Census Bureau, political and redistricting data from the Department of Legislative Services and the Virginia State Board of Elections, and the Maptitude for Redistricting geographic information system (GIS) software and manuals from Caliper Corporation.

The redistricting geographic information system (GIS) software package used for this analysis is Maptitude for Redistricting from Caliper Corporation. The redistricting software was loaded with the census PL94-171 data from the Census and the Census geography as well as available redistricting and political data from Department of Legislative Services and the Virginia State Board of Elections. The full suite of census geography was available, including Census Places, Voting Districts, water bodies, and roads, as well as Census Blocks which are the lowest level of geography for which the Census Bureau reports population counts.

The Department of Legislative Services provided political data for 2008 and 2009 for use during the General Assembly redistricting process. I prepared reports and analysis based on this data for the Benchmark, Enacted and Alternative Plans. In addition, I was provided data for the 2012 presidential election by counsel and asked to analyze this data for the Benchmark, Enacted, and Alternative Plans.

Table 1. Benchmark 2001 Congressional Districts Election Data

CD	Current Party	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09
1	R	65%	35%	62%	38%	63%	37%
2	R	62%	38%	56%	44%	60%	40%
3	D	34%	66%	33%	67%	35%	65%
4	R	61%	39%	59%	41%	61%	39%
5	R	61%	39%	60%	40%	62%	38%
6	R	67%	33%	66%	34%	67%	33%
7	R	66%	34%	63%	37%	65%	35%
8	D	39%	61%	37%	63%	36%	64%
9	R	67%	33%	66%	34%	66%	34%
10	R	61%	39%	58%	42%	58%	42%
11	D	55%	45%	52%	48%	52%	48%

Table 1. Benchmark 2001 Congressional Districts Election Data

CD	Current Party	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08		Rep. Pres. '12	Dem. Pres. '12	Other Pres. '12
1	R	53%	47%	1%	38%	61%	1%		52%	47%	1%
2	R	50%	50%	1%	34%	64%	1%		48%	50%	1%
3	D	25%	75%	1%	18%	81%	1%		23%	75%	1%
4	R	50%	49%	1%	37%	61%	1%		49%	50%	1%
5	R	52%	47%	1%	35%	64%	1%		52%	46%	2%
6	R	58%	41%	1%	41%	58%	1%		59%	40%	2%
7	R	54%	45%	1%	39%	59%	1%		54%	44%	1%
8	D	32%	67%	1%	25%	73%	1%		30%	68%	1%
9	R	59%	39%	1%	36%	63%	1%		64%	34%	2%
10	R	48%	51%	1%	38%	61%	1%		48%	51%	1%
11	D	44%	56%	1%	35%	64%	1%		42%	57%	1%

Table 2. Enacted Congressional Districts Election Data

CD	Current Party	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09
1	R	66%	34%	63%	37%	64%	36%
2	R	62%	38%	57%	43%	60%	40%
3	D	31%	69%	29%	71%	31%	69%
4	R	63%	37%	60%	40%	62%	38%
5	R	62%	38%	61%	39%	62%	38%
6	R	67%	33%	67%	33%	68%	32%
7	R	68%	32%	65%	35%	67%	33%
8	D	40%	60%	38%	62%	38%	62%
9	R	66%	34%	66%	34%	66%	34%
10	R	63%	37%	60%	40%	60%	40%
11	D	50%	50%	47%	53%	47%	53%

Table 2. Enacted Congressional Districts Election Data

CD	Current Party	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08		Rep. Pres '12	Dem. Pres. '12	Other Pres. '12
1	R	53%	46%	1%	39%	60%	1%		53%	46%	1%
2	R	50%	49%	1%	35%	64%	1%		49%	50%	1%
3	D	22%	78%	1%	16%	83%	1%		20%	79%	1%
4	R	51%	48%	1%	39%	60%	1%		50%	49%	1%
5	R	52%	47%	1%	36%	63%	1%		53%	46%	2%
6	R	58%	41%	1%	42%	57%	1%		59%	39%	2%
7	R	56%	43%	1%	41%	58%	1%		57%	42%	1%
8	D	33%	66%	1%	26%	73%	1%		31%	68%	1%
9	R	59%	40%	1%	36%	63%	1%		63%	35%	2%
10	R	50%	50%	1%	39%	60%	1%		50%	49%	1%
11	D	38%	61%	1%	30%	68%	1%		36%	62%	1%

Table 3. Plaintiffs' Alternative Congressional Districts Election Data

CD	Current Party	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09
1	R	66%	34%	63%	37%	64%	36%
2	R	57%	43%	52%	48%	55%	45%
3	D	38%	62%	36%	64%	37%	63%
4	R	63%	37%	60%	40%	62%	38%
5	R	62%	38%	61%	39%	62%	38%
6	R	67%	33%	67%	33%	68%	32%
7	R	68%	32%	65%	35%	67%	33%
8	D	40%	60%	38%	62%	38%	62%
9	R	66%	34%	66%	34%	66%	34%
10	R	63%	37%	60%	40%	60%	40%
11	D	50%	50%	47%	53%	47%	53%

Table 3. Plaintiffs' Alternative Congressional Districts Election Data

CD	Current Party	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08		Rep. Pres. '12	Dem. Pres. '12	Other Pres. '12
1	R	53%	46%	1%	39%	60%	1%		53%	46%	1%
2	R	44%	55%	1%	31%	68%	1%		44%	55%	1%
3	D	28%	71%	1%	20%	78%	1%		25%	73%	1%
4	R	51%	48%	1%	39%	60%	1%		50%	49%	1%
5	R	52%	47%	1%	36%	63%	1%		53%	46%	2%
6	R	58%	41%	1%	42%	57%	1%		59%	39%	2%
7	R	56%	43%	1%	41%	58%	1%		57%	42%	1%
8	D	33%	66%	1%	26%	73%	1%		31%	68%	1%
9	R	59%	40%	1%	36%	63%	1%		63%	35%	2%
10	R	50%	50%	1%	39%	60%	1%		50%	49%	1%
11	D	38%	61%	1%	30%	68%	1%		36%	62%	1%

Executive Summary

In his several reports, Dr. McDonald offers many criticisms of the Enacted Plan and contends that it was drawn as an unconstitutional racial gerrymander. Based on a review and analysis of the available data, I conclude that the Enacted Plan is not a racial gerrymander, that politics rather than race predominated, and that the Alternative Plan would not be an appropriate substitute for the Enacted Plan.

The Alternative Plan was not before the General Assembly at the time it adopted the Enacted plan, but was instead offered for the first time in connection with this litigation in February 2014. The Alternative Plan therefore says little, if anything, about the General Assembly's purpose in enacting the Enacted Plan.

The Alternative Plan is at least as race-conscious as, perhaps even more race-conscious than, the Enacted Plan. The Alternative Plan retains most of the Benchmark District 3 that Dr. McDonald criticized as "constitutionally suspect," and replicates many of the geographic trades between District 3 and surrounding districts that Dr. McDonald previously argued were predominantly racial, including the move of the City of Petersburg into District 3. In fact, the only difference between the Enacted Plan and the Alternative Plan is the placement of the boundary between Districts 2 and 3. The Alternative Plan moves that boundary to achieve its avowed racial goal of achieving a barely "majority-minority district." 2/21/14 McDonald, page 9.

Second, Dr. McDonald does not even attempt to suggest that race, rather than politics, was the predominant reason for the Enacted Plan's treatment of the District 2 and 3 population trades. Such political concerns readily explain the drawing of District 2, where Republican Congressman Scott Rigell was serving in his first term after defeating a Democratic incumbent in this closely-divided district. District 2 in the Enacted Plan, as enacted by the Republican-controlled General Assembly, provides an obvious political benefit to Republicans by preserving the prospects for the re-election of now-incumbent Congressman Rigell. This refutes the notion that race was the predominant factor in the population trades in this area.

Third, the Alternative Plan and Dr. McDonald's reports fail to show that the General Assembly could have achieved its political goals through a plan that was comparably consistent with traditional redistricting principles as the Enacted Plan and that brought about "significantly greater racial balance." The Alternative Plan undermines rather than advances the presumed political goals of the General Assembly because it replaces the political strengthening of Congressman Rigell in District 2 with a plan that weakens his electoral prospects relative not only to the Enacted Plan, but even the prior district. While Dr. McDonald argues that the Alternative Plan marginally outperforms the Enacted Plan on certain traditional redistricting principles, he does not even mention other principles where the Alternative Plan performs worse than the Enacted Plan – such as preserving the cores of existing districts, protecting incumbents, and complying with

the Voting Rights Act. Indeed, by lowering District 3's Black VAP to a barely majority level that would also be lower than the Benchmark level, the Alternative Plan would have presented obstacles to preclearance that the Enacted Plan did not present. Finally, since Alternative District 3 maintains a black majority that is 6% different in Black VAP than the Enacted District 3, it does not bring about a "greater racial balance."

Under Dr. McDonald's Own Analysis, the Alternative Plan is Just as Race-conscious as the Enacted Plan

Under Dr. McDonald's own approach, the Alternative Plan is at least as race conscious as the Enacted Plan. First, Dr. McDonald criticizes both the District 3 drawn after the *Moon v. Meadows* case and the Benchmark District 3 as "constitutionally suspect" under *Shaw* and the Supreme Court's racial gerrymandering cases – but the Alternative Plan retains most of the population, shape and geography of Benchmark District 3. With respect to changes to Benchmark District 3, the Alternative Plan replicates many of the trades between District 3 and surrounding districts – such as the addition of Petersburg to District 3 – 'that Dr. McDonald concluded in his first report were predominantly racial. McDonald states that the Virginia General Assembly "strategically traded populations in and out of the Third Congressional District so as to *increase* the Black Voting Age Population of the District." McDonald 12/6/13 Report, page 1, with emphasis in original. Applying Dr. McDonald's own analysis, the Alternative Plan strategically trades populations in and out of the Third Congressional District so as to

decrease the Black Voting Age Population of the District.

Alternative District 3 Retains Portions of Benchmark District 3 Which Dr. McDonald and Plaintiffs Allege is Unconstitutional.

In his 1/20/14 report, McDonald states that: "There is no reason to believe that race was not also the predominant factor in the creation of the Remedial and Benchmark Third Districts." 1/20/14 McDonald. page 6. He concluded that both the Remedial version of District 3 adopted after *Moon v. Meadows* and the Benchmark District 3 adopted in 2001 are "constitutionally suspect" for this reason. McDonald further notes that "the constitutionality of the Benchmark District was never upheld by a court" 1/20/14 McDonald, page 9. Yet despite these misgivings about the constitutionality of the predecessor districts, Alternative District 3 retains most of Benchmark District 3, including its population, shape and geography. In his 12/16/13 Report, Dr. McDonald applies the geographically descriptive language of District 3 from the *Moon* case to analyze District 3 of the Enacted Plan. In that same fashion, much of this geographically descriptive language applies to Alternative District 3. Just like the Remedial and Benchmark and Enacted District 3, Alternative District 3:

- "is anchored in the tidewater" region of Virginia and encompasses "Suffolk [,] Portsmouth[.] Hampton [and] Newport News."
- "us[es] only the open water of...the James River" to connect areas of the district,

- "crosses the James River into largely rural Surry County, recrossing the James River to take in all of the African-American majority Charles City County,"
- "to the south...runs through Prince George County,"
- "to the east...takes in part of rural southeastern Henrico county before reaching the more built up and heavily black eastern suburbs of Richmond, racially dividing the capital city... before terminating in a small black neighborhood in northern Henrico County." McDonald 12/6/13 Report, page 6

Thus, on Dr. McDonalds own analysis, Alternative District 3 is "constitutionally suspect" because "[t]here is no reason to believe that race was not also the predominant factor in [its] creation." 1/20/14 McDonald, page 6.

The Alternative Plan Replicates the Trades between Districts 4 and 7 and District 3 That Dr. McDonald Identified as Predominantly Racial

With respect to the 2012 changes to Benchmark District 3, Alternative District 3 makes virtually all of the major changes made by Enacted District 3 that Dr. McDonald concluded were predominantly driven by race.

First, Dr. McDonald criticized the Enacted Plan's population trades between District 3 and District 4 because "the primary result of these trades was to move the entirety of the densely African-American community of Petersburg from the Benchmark Fourth to the adopted Third District." 12/6/14

McDonald Report, page 22. Dr. McDonald concluded that the "assignment of Petersburg to the adopted Third District is similar to the unconstitutional district at issue in *Moon vs. Meadows*." 12/6/13 McDonald Report, page 23. He also concluded that race explains the General Assembly's movement of whiter populations in Prince George County from Benchmark District 3 to Enacted District 4.

The Alternative Plan precisely replicates these trades between Districts 3 and 4. The Alternative Plan moves "the entirety of the densely populated African-American community of Petersburg from the Benchmark Fourth to the [Alternative] Third District," and it makes the same trades in Prince George County from the benchmark District 3 to District 4 that Dr. McDonald objected to in his first report. 12/6/13 McDonald Report, page 22. Thus, according to Dr. McDonald's own analysis, the Alternative Plan's "assignment of Petersburg to the adopted Third District is similar to the unconstitutional district at issue in Moon vs. Meadows." 12/6/13 McDonald Report, page 23.

Second, Dr. McDonald criticizes the Enacted Plan because population trades between District 7 and District 3 involved "shifting lower Black VAP New Kent and one Richmond VTD form the benchmark Third District to the adopted Seventh District in exchange for much higher Black VAP VTDs moved from the benchmark Seventh District to the adopted Third District." 12/6/13 McDonald Report, page 24. Dr. McDonald concluded that these moves showed that "Virginia chose to further racially segregate localities", including "Richmond." 12/6/13 McDonald Report, page 26. Dr. McDonald further stated that

Enacted District 3 "takes in rural eastern Henrico County before reaching the more built up and heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a black neighborhood in northern Henrico County." 12/6/13 McDonald Report, page 6.

Again, the Alternative Plan makes exactly these same trades between Districts 3 and 7. The Alternative Plan moves predominantly white New Kent County from Benchmark 3 to District 7 and the "much higher Black VAP VTDs" in Henrico and Richmond from Benchmark District 7 to District 3. 12/6/13 McDonald Report, page 24. Thus, in Dr. McDonald's own view the choice of population moves in the Alternative Plan serves "to further racially segregate localities," including "Richmond," 12/6/13 McDonald Report, page 26, such that the Alternative Plan "takes in rural eastern Henrico County before reaching the more built up and heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a black neighborhood in northern Henrico County." 12/6/13 McDonald Report, page 6.

The Alternative Plan's Trades between Districts 1 and 2 and District 3 Strategically Decrease the Black VAP in District 3

The Enacted Plan's trades between Districts 1, 2 and 3 involve a much smaller population and have a significantly smaller impact on District 3's racial composition than the Alternative Plan's trades between those districts. The Enacted Plan moves 84,057 total people back and forth between Districts 1, 2 and 3 from the Benchmark Plan. Given the ideal

congressional district size of 727,366, these changes equal 11.6% of a district. The Alternative Plan moves 287,015 people back and forth between Districts 1, 2 and 3 from the Benchmark Plan, which is almost four times as many people moved as were shifted in these districts in the Enacted Plan. Given the ideal congressional district size of 727,366, these changes equal 39.5% of a district.

Table 4. Population Affected by Trades in Districts 1, 2 and 3

Benchmark to Enacted District	**Population**	**VAP**
1-to-3	23,288	17,805
3-to-1	7,351	5,106
1&3 Subtotal	**30,639**	**22,911**
2-to-3	27,917	20,543
3-to-2	25,501	20,049
2&3 Subtotal	**53,418**	**40,592**
Total Affected	**84,057**	**63,503**
Ideal District size	**727,366**	
% Affected	**11.6%**	

Table 4. Population Affected by Trades in Districts 1, 2 and 3

Benchmark to Alternative District	**Population**	**VAP**
1-to-3	106,886	83,523
3-to-1	7,351	5,106
1&3 Subtotal	**114,237**	**88,629**
2-to-3	45,798	35,556
3-to-2	126,980	97,432

2&3 Subtotal	**172,778**	**132,988**
Total Affected	**287,015**	**221,617**
Ideal District size	**727,366**	
% Affected	**39.5%**	

In the Enacted Plan the net result of these trades between Districts 1, 2, and 3 add 9,399 Black VAP (exclusive) and 9,658 Black VAP (inclusive) to Enacted District 3. The Enacted Plan's trades between Districts 1 and 3 had a minimal racial impact on District 3 because the Black VAP of the areas moved into and out of district were virtually the same – at approximately 44% Black VAP. In fact, these trades slightly decreased the overall Black VAP of District 3 as compared to the Benchmark District 3. Indeed, Dr. McDonald recognizes that "a slightly higher BVAP percentage was transferred into the First District." 12/6/13 McDonald, page 18. Moreover, the area transferred into District 3 has a lower Black VAP, 43.4% (exclusive) or 44.6% (inclusive), than the Benchmark District 3's Black VAP of 53.1% (exclusive) or 53.9% (inclusive).

The Enacted Plan's trades between Districts 2 and 3 also bring an area into District 3 that has a lower Black VAP – 36.7% (exclusive) and 37.9% (inclusive) – than the rest of Benchmark District 3. The area transferred out of District 3 has a Black VAP of 18.3% (exclusive) and 18.8% (inclusive), meaning that the difference between these two areas is 18.4% (exclusive) and 19.1% (inclusive). But the net number of Black VAP moved into District 3 is only 3,887 (exclusive) or 4,011 (inclusive).

Table 5. Population Trades between Benchmark and Enacted Plan in Districts 1, 2 and 3

Benchmark to Enacted District	Population	VAP	Black VAP (exclusive method)	Black VAP (inclusive method)
1-to-3	23,288	17,805	7,736	7,933
3-to-1	7,351	5,106	2,224	2,286
Net to 3 from 1	**15,937**	**12,699**	**5,512**	**5,647**
2-to-3	27,917	20,543	7,548	7,785
3-to-2	25,501	20,049	3,661	3,774
Net to 3 from 2	**2,416**	**494**	**3,887**	**4,011**
Net to 3 from 1&2	**18,353**	**13,193**	**9,399**	**9,658**

Table 5. Population Trades between Benchmark and Enacted Plan in Districts 1, 2 and 3

Benchmark to Enacted District	Population	VAP	% Black VAP (exclusive method)	% Black VAP (inclusive method)
1-to-3	23,288	17,805	43.4%	44.6%
3-to-1	7,351	5,106	43.6%	44.8%
Net to 3 from 1	**15,937**	**12,699**		
2-to-3	27,917	20,543	36.7%	37.9%
3-to-2	25,501	20,049	18.3%	18.8%
Net to 3 from 2	**2,416**	**494**		
Net to 3 from 1&2	**18,353**	**13,193**		

By contrast, the Alternative Plan's trades between Districts 1, 2 and 3 are far more sweeping and have a much greater racial effect on the Black VAP of District 3. The net result of these trades between Districts 1, 2, and 3 serve to *decrease* the Black VAP of Alternative District 3 by 23,293 Black VAP (exclusive) and 23,232 Black VAP (inclusive).

The Alternative Plan causes this overall decrease by moving higher Black VAP areas out of District 3 and moving much lower Black VAP areas into District 3. The Alternative Plan's trades between 1 and 3 move a 43.6% (exclusive) or 44.8% (inclusive) Black VAP area out of District 3 and a 29.6% (exclusive) of (30.3%) inclusive Black VAP area into District 3 – a difference of 14.0% (exclusive) or 14.5% (inclusive) Black VAP. This populous area of more than 106,000 people moved into District 3 has a much lower Black VAP than Benchmark District 3.

The Alternative Plan's trades between District 2 and 3 move a 56.8% (exclusive) and 57.6% (inclusive) Black VAP area out of District 3 and a 27.0% (exclusive) or 27.7% (inclusive) Black VAP area into District 3 – a difference of 29.8% (exclusive) or 29.9% (inclusive) Black VAP. The populous area of more than 126,000 people moved out of District 3 has a higher Black VAP than the Benchmark District 3.

None of the Alternative Plan's trades between Districts 1, 2 and 3 are explained on non-racial grounds, such as politics and incumbency protection. Thus, the Alternative Plan is at least as race-conscious, and arguably even more race-conscious, than the Enacted Plan.

Table 6. Population Trades between Benchmark and Alternative Plan in Districts 1, 2 and 3

Benchmark to Alternative District	Population	VAP	Black VAP (exclusive method)	Black VAP (inclusive method)
1-to-3	106,886	83,523	24,714	25,349
3-to-1	7,351	5,106	2,224	2,286
Net to 3 from 1	**99,535**	**78,417**	**22,490**	**23,063**
2-to-3	45,798	35,556	9,599	9,866
3-to-2	126,980	97,432	55,382	56,161
Net to 3 from 2	**-81,182**	**-61,876**	**-45,783**	**-46,295**
Net to 3 from 1&2	**18,353**	**16,541**	**-23,293**	**-23,232**

Table 6. Population Trades between Benchmark and Alternative Plan in Districts 1, 2 and 3

Benchmark to Alternative District	Population	VAP	% Black VAP (exclusive method)	% Black VAP (inclusive method)
1-to-3	106,886	83,523	29.6%	30.3%
3-to-1	7,351	5,106	43.6%	44.8%
Net to 3 from 1	**99,535**	**78,417**		
2-to-3	45,798	35,556	27.0%	27.7%
3-to-2	126,980	97,432	56.8%	57.6%
Net to 3 from 2	**-81,182**	**-61,876**		
Net to 3 from 1&2	**18,353**	**16,541**		

Looked at another way, the Alternative Plan's trades in Districts 1, 2 and 3 would have reduced the Black VAP of District 3 to a minority-Black VAP level below 50% from the 53.1% (exclusive) or 53.9% (inclusive) of the Benchmark District 3. This strategic decrease in Black VAP caused by the Alternative Plan's trades in Districts 1, 2 and 3, requires a strategic increase in Black VAP on the northern end of District 3 in order to achieve the avowed racial goal of preserving District 3 as a barely "majority-minority district." These necessary strategic trades to increase the Black VAP in the north of Alternative District 3 caused by the Alternative Plan's trades to *decrease* the Black VAP in Districts 1, 2 and 3 are exactly the trades Dr. McDonald concluded were predominantly racial: adding Petersburg into Alternative District 3 and "shifting lower Black VAP New Kent and one Richmond VTD form the benchmark Third District to the adopted Seventh District in exchange for much higher Black VAP VTDs moved from the benchmark Seventh District to the adopted Third District." 12/6/13 McDonald Report, pages 22-24.

Dr. McDonald offers No Proof That Race Rather than Politics Predominated in the Enacted Plan

In the *Easley vs. Cromartie* case, the court discusses that because "race and political affiliation" often are "highly correlated," Plaintiffs bear the "demanding burden" to show that race rather than politics predominated in the drawing of the challenged plan and district within the that plan. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001). Similarly in this case, it is my understanding

Plaintiffs must show that "race rather than politics" predominated in the drawing of the Enacted Plan and Enacted District 3. It is my understanding that if changes to District 3 in the Enacted Plan are equally consistent with politics as they are with race, then the Plaintiffs' efforts would be insufficient to require a change in the Virginia congressional districts enacted by the General Assembly. Dr. McDonald does not even mention the political considerations in the Enacted Plan, much less separate those considerations from race and show that race predominated in the Enacted Plan.

The Enacted Plan, when viewed as a whole, preserves the cores of the Benchmark districts while achieving the necessary population equality and politically strengthening incumbents of both parties. This bears out especially in the key metric of the 2008 Presidential race, which was available to the Republican-controlled General Assembly at the time of the redistricting, as well as in the metric of the later 2012 race, which essentially validates the conclusion that politics explain the Enacted Plan. On these metrics, 2 of the 3 Democratic districts, including District 3, became more Democratic while 7 of the 8 Republican districts, including Districts 1, 2, 4 and 7 that surround District 3, became more Republican. (This number includes heavily Republican District 6, which becomes more Republican on the 2012 metric and no more Democratic on the 2008 metric.) The exceptions are heavily Democratic District 8 and heavily Republican District 9, but the changes there not significant in light of the overall political composition of those districts.

Table 7. Benchmark and Enacted Districts with 2008, 2012 Presidential Data

		Benchmark		Enacted		Difference		
CD	Current Party	Rep. Pres. '08	Dem. Pres. '08	Rep. Pres. '08	Dem. Pres. '08	DIFF Rep. Pres. '08	DIFF Dem. Pres. '08	Change
1	R	52.5%	46.6%	53.3%	45.8%	0.8%	-0.8%	More R
2	R	49.5%	49.5%	49.7%	49.3%	0.2%	-0.2%	More R
3	D	24.7%	74.6%	21.8%	77.6%	-3.0%	3.0%	More D
4	R	49.9%	49.3%	51.3%	48.0%	1.4%	-1.4%	More R
5	R	51.8%	47.3%	52.2%	46.8%	0.4%	-0.4%	More R
6	R	57.8%	41.2%	57.7%	41.2%	0.0%	0.0%	Neither
7	R	54.0%	45.2%	56.3%	42.8%	2.4%	-2.4%	More R
8	D	31.9%	67.2%	32.8%	66.3%	0.9%	-0.9%	More R
9	R	59.3%	39.2%	58.9%	39.7%	-0.5%	0.5%	More D
10	R	47.7%	51.5%	49.6%	49.6%	1.9%	-1.9%	More R
11	D	43.6%	55.6%	38.5%	60.7%	-5.2%	5.1%	More D

Table 7. Benchmark and Enacted Districts with 2008, 2012 Presidential Data

		Benchmark		Enacted		Difference		
CD	Current Party	Rep. Pres. '12	Dem. Pres. '12	Rep. Pres. '12	Dem. Pres. '12	DIFF Rep. Pres. '12	DIFF Dem. Pres. '12	Change
1	R	52.0%	46.6%	52.9%	45.7%	1.0%	-1.0%	More R
2	R	48.2%	50.3%	48.6%	50.0%	0.3%	-0.3%	More R
3	D	23.3%	75.5%	20.0%	78.8%	-3.3%	3.3%	More D
4	R	48.6%	50.3%	50.1%	48.7%	1.5%	-1.6%	More R
5	R	52.0%	46.4%	52.5%	45.9%	0.6%	-0.5%	More R
6	R	58.7%	39.5%	58.8%	39.4%	0.1%	-0.1%	More R
7	R	54.5%	44.1%	56.9%	41.7%	2.4%	-2.5%	More R
8	D	30.5%	68.2%	31.0%	67.8%	0.5%	-0.5%	More R
9	R	63.9%	34.1%	63.0%	34.9%	-0.8%	0.8%	More D
10	R	48.0%	50.6%	49.9%	48.7%	1.9%	-1.8%	More R
11	D	41.5%	57.2%	36.4%	62.3%	-5.2%	5.1%	More D

The changes to District 3 in the Enacted Plan had the effect of not only slightly increasing the Black VAP of District 3, while increasing the Democratic strength of District 3, but also of making the surrounding districts stronger for the incumbent congressmen. This was true in District 2, where the evenly divided political composition and election history would have provided a Republican-controlled General Assembly with a reason to strengthen one-term incumbent Republican Congressman Scott Rigell. According to the 2008 Presidential results,

District 2 was the most closely divided of all the districts, with Democrat Barack Obama and Republican John McCain each capturing 49.5% of the vote. That same year Democrat Glenn Nye defeated a two-term Republican incumbent Congresswoman Thelma Drake to win election to Congress from Benchmark District 2. Scott Rigell first won election from District 2 in 2010 when he defeated then incumbent Congressman Nye.

Thus, when the General Assembly considered the Enacted Plan in 2011 and 2012, Congressman Rigell was a freshman Member of Congress from a closely-divided district that had voted out the incumbents in two consecutive elections. The General Assembly made trades between adjacent Districts 1 and 3 that improved the re-election prospects of Congressman Rigell. This is clear not only from the fact that District 2 became slightly more Republican in the enacted plan, but also from the political composition of the Enacted Plan's trades between Districts 2 and 3. The Enacted Plan trades a 64% (2008) or 69% (2012) Democratic area for a nearly identically-sized 52% (2008) or 50% (2012) Republican area, which has the effect of making District 2 more Republican. Even with the need to gain over 11% population in Benchmark District 2, the changes resulting in Enacted District 2 serve to improve the electoral prospects of incumbent Congressman Scott Rigell and result in a district that is essentially evenly divided politically on the 2008 presidential political data.

Table 8. Population Movement Between Benchmark and Enacted Districts with 2008, 2012 Presidential Data

Benchmark to Enacted District	Population	Rep. Pres. '08 %	Dem. Pres. '08 %	Oth. Pres. '08 %
1-to-3	23,288	39%	60%	1%
3-to-1	7,351	24%	75%	0%
2-to-3	27,917	35%	64%	1%
3-to-2	25,501	52%	47%	1%
4-to-3	35,447	13%	86%	1%
3-to-4	5,713	46%	53%	1%
3-to-7	20,217	63%	36%	1%
7-to-3	36,106	14%	85%	1%

Table 8. Population Movement Between Benchmark and Enacted Districts with 2008, 2012 Presidential Data

Benchmark to Enacted District	Population	Rep. Pres. '12 %	Dem. Pres. '12 %	Oth. Pres. '12 %
1-to-3	23,288	33%	66%	1%
3-to-1	7,351	23%	76%	1%
2-to-3	27,917	30%	69%	1%
3-to-2	25,501	50%	48%	1%
4-to-3	35,447	11%	88%	1%
3-to-4	5,713	44%	55%	1%
3-to-7	20,217	64%	34%	1%
7-to-3	36,106	13%	86%	1%

Indeed, the trades involving District 3 that Dr. McDonald concludes are racially-motivated are just as readily, and perhaps more readily, explained by politics than by race because they make District 3 more Democratic and surrounding Districts more Republican. Dr. McDonald, however, does not

discuss the political effects of these trades, much less refute this non-racial explanation for them.

The Alternative Plan Does not Prove That The Enacted Plan Was A Racial Gerrymander

I understand that "in a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with the traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." *Easley*, 532 U.S. at 258.

I have been asked to analyze whether the Alternative Plan achieves the General Assembly's political goals in the Enacted Plan, is as consistent with traditional redistricting principles as the Enacted Plan, and brings about a "significantly greater racial balance" than the Enacted Plan. I conclude that the Alternative Plan does not achieve any of these results.

The Alternative Plan Undermines, Rather Than Achieves, The General Assembly's Political Goals, Including the Goal to Strengthen the Incumbent in District 2.

The Alternative Plan fails rather than serves the General Assembly's political goals, especially to strengthen Congressman Rigell in District 2. The Alternative Plan not only fails to strengthen Congressman Rigell politically, it weakens him

politically, and appears to be drawn to turn District 2 into a Democratic district. While Republican presidential candidate John McCain captured 49.5% of the vote in Benchmark District 2 in 2008 and he would have captured 49.7% of the vote in the area covered by the Enacted District 2, he would have received only 44.3% of the vote in the area covered by Alternative District 2. In other words, the Alternative Plan would swing the closely-divided District 2 approximately 5.3% more Democratic than Benchmark District 2 and 5.5% more Democratic than Enacted District 2, to the obvious disadvantage of Congressman Rigell and the obvious advantage of Democrats. The Republican-controlled General Assembly would have had ample political reason not to adopt the Alternative Plan, and instead to adopt the Enacted Plan that strengthened Congressman Rigell and did not advance the electoral prospects of his next Democratic challenger.

Indeed, the change in the presidential 2008 political performance in Alternative Plan District 2 from the Benchmark District 2 stands out as the greatest change of any district in the Alternative Plan and it is *against* the political party of the incumbent. The second-most changed district is District 11, which shows a change of 5.2% in the 2008 presidential vote, and this change is *in favor of* incumbent Democrat Congressman Gerry Connolly, who had just won a close re-election in 2010.

Table 9. Benchmark and Alternative Districts with 2008, 2012 Presidential Data

		Benchmark		Plaintiffs' Alt.		Difference		
CD	Current Party	Rep. Pres. '08	Dem. Pres. '08	Rep. Pres. '08	Dem. Pres. '08	DIFF Rep. Pres '08	DIFF Dem. Pres '08	Change
1	R	52.5%	46.6%	53.3%	45.8%	0.8%	-0.8%	More R
2	R	49.5%	49.5%	44.3%	54.9%	-5.3%	5.3%	More D
3	D	24.7%	74.6%	27.8%	71.5%	3.1%	-3.2%	More R
4	R	49.9%	49.3%	51.3%	48.0%	1.4%	-1.4%	More R
5	R	51.8%	47.3%	52.2%	46.8%	0.4%	-0.4%	More R
6	R	57.8%	41.2%	57.7%	41.2%	0.0%	0.0%	Neither
7	R	54.0%	45.2%	56.3%	42.8%	2.4%	-2.4%	More R
8	D	31.9%	67.2%	32.8%	66.3%	0.9%	-0.9%	More R
9	R	59.3%	39.2%	58.9%	39.7%	-0.5%	0.5%	More D
10	R	47.7%	51.5%	49.6%	49.6%	1.9%	-1.9%	More R
11	D	43.6%	55.6%	38.5%	60.7%	-5.2%	5.1%	More D

Table 9. Benchmark and Alternative Districts with 2008, 2012 Presidential Data

		Bench-mark		Plaintiffs' Alt.		Difference		
CD	Current Party	Rep. Pres. '12	Dem. Pres. '12	Rep. Pres. '12	Dem. Pres. '12	DIFF Rep. Pres '12	DIFF Dem. Pres. '12	Change
1	R	52.0%	46.6%	52.9%	45.7%	1.0%	-1.0%	More R
2	R	48.2%	50.3%	43.6%	55.1%	-4.7%	4.7%	More D
3	D	23.3%	75.5%	25.4%	73.3%	2.0%	-2.2%	More R
4	R	48.6%	50.3%	50.1%	48.7%	1.5%	-1.6%	More R
5	R	52.0%	46.4%	52.5%	45.9%	0.6%	-0.5%	More R
6	R	58.7%	39.5%	58.8%	39.4%	0.1%	-0.1%	More R
7	R	54.5%	44.1%	56.9%	41.7%	2.4%	-2.5%	More R
8	D	30.5%	68.2%	31.0%	67.8%	0.5%	-0.5%	More R
9	R	63.9%	34.1%	63.0%	34.9%	-0.8%	0.8%	More D
10	R	48.0%	50.6%	49.9%	48.7%	1.9%	-1.8%	More R
11	D	41.5%	57.2%	36.4%	62.3%	-5.2%	5.1%	More D

The Alternative Plan's trades in Districts 1, 2 and 3 undermine the political goals of the General Assembly to unify the districts politically and to strengthen incumbents of both parties. The trades that the Alternative Plan makes involving District 3 that Dr. McDonald claims are necessary to remedy an alleged racial gerrymander in fact turn closely-divided District 2 into a Democratic district. This is exactly contrary to the effect of the Enacted Plan passed by the General Assembly. The Alternative Plan caused this result by moving an 81% (2008) or

81% (2012) Democratic area of more than 126,000 people in to District 2, and a much smaller, relatively more Republican area which is 50% (2008) or 55% (2012) Democratic out of District 2 and into District 3.

In addition, the Alternative Plan takes populous territory from Benchmark District 1 which could have strengthened Congressman Rigell in District 2 (and indeed was moved to District 2 in the Enacted Plan) and moves it to District 3. This also has the effect of undermining Congressman Rigell and making District 3 less Democratic.

Table 10. Population Movement Between Benchmark and Alternative Districts with 2008, 2012 Presidential Data

Benchmark to Alternative District	Population	Rep. Pres. '08 %	Dem. Pres. '08 %	Oth. Pres. '08 %
1-to-3	106,886	45%	54%	1%
3-to-1	7,351	24%	75%	0%
2-to-3	45,798	49%	50%	1%
3-to-2	126,980	19%	81%	1%
4-to-3	35,447	13%	86%	1%
3-to-4	5,713	46%	53%	1%
7-to-3	36,106	14%	85%	1%
3-to-7	20,217	63%	36%	1%

Table 10. Population Movement Between Benchmark and Alternative Districts with 2008, 2012 Presidential Data

Benchmark to Alternative District	Population	Rep. Pres. '12 %	Dem. Pres. '12 %	Oth. Pres. '12 %
1-to-3	106,886	41%	57%	1%
3-to-1	7,351	23%	76%	1%
2-to-3	45,798	43%	55%	2%
3-to-2	126,980	18%	81%	1%
4-to-3	35,447	11%	88%	1%
3-to-4	5,713	44%	55%	1%
7-to-3	36,106	13%	86%	1%
3-to-7	20,217	64%	34%	1%

The Alternative Plan is Not as Consistent with Traditional Redistricting Principles as the Enacted Plan

When compared to the Enacted Plan, the Alternative Plan is not as consistent with traditional redistricting principles. While the Alternative Plan may have a marginal effect on two principles, it is significantly worse with respect to a number of others including preservation of cores and communities of interest, protection of incumbents, and compliance with the Voting Rights Act.

Compactness

Dr. McDonald asserted in his 12/6/13 report that Enacted District 3 "is an extreme district" and the least compact of the Virginia congressional districts on three measures, the Reock test, the Polsby-Popper test, and the Schwartzberg test. 12/6/13 McDonald, page 7. Dr. McDonald, however, provides no

standard for determining when a district is acceptably compact or unacceptably non-compact. McDonald identifies only marginal differences in District 3's compactness scores in the Enacted and Alternative Plans. Enacted District 3 scores a 0.19 on the Reock test, 0.08 on the Polsby-Popper test and 3.07 on the Schwartzberg test. 12/6/13 McDonald, page 7. Alternative District 3 scores 0.22 on the Reock test, only 0.03 points better than Enacted District 3; 0.11 on the Polsby-Popper test, again only 0.03 points better than the Enacted District 3; and 2.61 on the Schwartzberg test. (In the 2/21/14 McDonald Report Table 4, Dr. McDonald lists the value for District 3 as 2.04, while the compactness reports I ran for the Schwartzberg Test show it to be 2.61.) Dr. McDonald does not suggest that these small numerical differences have real-world significance, or are meaningful under some professionally accepted standard. He does not suggest that Alternative District 3 meets a professionally accepted standard for minimally acceptable compactness, which Enacted District 3 does not satisfy and Alternative District 3 does. I am not aware of any such standard.

In his reports, Dr. McDonald fails to mention at least two other compactness measures under which Enacted District 3 is *more* compact than Alternative District 3. On the Ehrenburg test – which computes the ratio of the largest inscribed circle divided by the area of the district and treats higher numbers as more compact than lower numbers – Enacted District 3 scores 0.25, or better than Alternative District 3's score of 0.23. Likewise, on the Population Polygon test – which computes the ratio of the district

population to the approximate population of the convex hull of the district and treats higher numbers as more compact than lower numbers – Enacted District 3 scores 0.54, or better than Alternative District 3's score of 0.53.

Table 11. Compactness of Enacted and Alternative Congressional Districts

	Enacted Plan		Alternative Plan	
District	Population Polygon	Ehrenburg	Population Polygon	Ehrenburg
1	0.63	0.28	0.63	0.28
2	0.57	0.31	0.84	0.32
3	0.54	0.25	0.53	0.23
4	0.62	0.29	0.62	0.29
5	0.50	0.30	0.50	0.30
6	0.81	0.23	0.81	0.23
7	0.59	0.30	0.59	0.30
8	0.88	0.34	0.88	0.34
9	0.73	0.24	0.73	0.24
10	0.50	0.22	0.50	0.22
11	0.68	0.15	0.68	0.15

Dr. McDonald also suggests that whereas Enacted District 3 was the least compact under all three of his preferred measures, Alternative District 3 is the "second least compact" district on the Reock and Polsby-Popper tests and the "third least compact" district on the Schwartzberg test. 2/21/14 McDonald, pages 6-7. This means little because compactness scores are often at odds with each other. For example, District 9 is the least compact district and is slightly less compact then Alternative District 3, on the Reock test, but District 9 is more compact than

Alternative District 3 on the Polsby-Popper test. Likewise, compactness scores show that District 11 is the least compact on the Polsby-Popper test, but is more compact than Alternative District 3 on the Reock test.

Locality and VTD splits

One traditional redistricting criterion is the respect for municipal boundaries. The Virginia Senate in its redistricting criteria also suggested that VTDs should be preserved, but for both boundaries, the Virginia Senate treated them on par with the criterion of preserving other communities of interest. The Senate Criteria V. Communities of Interest state that:

> "Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, *governmental jurisdictions* and service delivery areas, *political beliefs*, voting trends and *incumbency considerations*. It is inevitable that some interests will be advanced more than others by the choice of particular district configurations. Public comment has been invited, has been and continues to be received, and will be considered. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people. Local government jurisdiction and precinct lines may reflect communities of

> interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest." Senate Criteria V. (emphasis added).

Dr. McDonald criticized the Enacted Plan in his first report because it splits "17 localities" into different districts across the state. 12/6/13 McDonald, page 9. But 3 of the localities are only "technically split" because all of the population "is in one district while one or more water blocks without population are in another district." Section 5 Submission, Statement of Change, page 11.

Dr. McDonald, moreover, has used two different methods for counting "splits" in localities. Whereas Dr. McDonald criticized the number of *split* localities in the Enacted Plan in his first report, his latest report does not mention that number, but instead counts the number of *times* localities are *split*. Thus, Dr. McDonald's first report counted a locality split into two districts as one "split locality," his latest report counts it as two "locality splits." Dr. McDonald's preference for "locality splits" masks the fact that the Alternative Plan splits *only one fewer locality* than the Enacted Plan.

Table 12. Split Localities in Enacted Plan and Alternative Plan

Split Localities affecting population	**Enacted Plan (Districts)**	**Plaintiffs Alternative Plan (Districts)**
Bedford	(5, 6)	(5, 6)
Chesterfield	(4, 7)	(4, 7)
Fairfax	(8,10,11)	(8,10,11)
Fauquier	(1,5)	(1,5)
Hampton	(2,3)	
Henrico	(3,7)	(3,7)
Henry	(5,9)	(5,9)
Newport News	(1,2,3)	(1,3)
Norfolk	(2,3)	
Prince George	(3,4)	(3,4)
Prince William	(1,10,11)	(1,10,11)
Richmond	(3,7)	(3,7)
Roanoke	(6,9)	(6,9)
Spotsylvania	(1,7)	(1,7)
Portsmouth		(2,3)
Total	**14**	**13**

Split Localities affecting no population	**Enacted Plan (Districts)**	**Plaintiffs Alternative Plan (Districts)**
Isle of Wight	(3,4)	(3,4)
James City	(1,3)	(1,3)
Suffolk	(3,4)	(3,4)

Total	**3**	**3**

There is no reason to conclude that this marginal difference in split localities is significant. The Enacted Plan fares much better than the Benchmark Plan on split localities because the Benchmark Plan split 19 localities affecting population as described in Section 5 Submission, Statement of Change, page 11. Dr. McDonald previously brushed aside this improvement because "the constitutionality of the Benchmark district was never upheld by a court" and in his view, "[n]or does the constitutionality of the [Enacted] Third District hinge on how it compares to the Benchmark District." 1/20/14 McDonald, page 9. Thus, Dr. McDonald suggested that "[e]ven if it improves to some degree upon aspects of the Benchmark District, the fact remains that like the *Moon v. Meadows* Unconstitutional District, the [Enacted] Third District has more splits than any other district." 1/20/14 McDonald, page 9. By the same analysis, the Alternative Plan's marginal improvement over the Enacted Plan on split localities – which are smaller than the Enacted Plan's improvement over the Benchmark Plan's splits – are irrelevant because the Alternative Plan's District 3 also creates more splits than any other district.

Moreover, contrary to Dr. McDonald's report, the Alternative Plan does not improve on the number of split VTDs – or even the number of VTD splits – when only splits affecting population are considered as was done in the Section 5 Submission. Dr. McDonald criticized the Enacted Plan in his first report because it splits "20 VTDs" into different districts across the state. 12/6/13 McDonald, page 10.

However, "[The Enacted Plan] splits 10 precincts across the state to meet the criteria adopted by the Committee, a significant reduction from the 26 split precincts in the current plan. (As in the case of split localities, these numbers exclude technically split precincts where all of the precinct's population is in one district and there is no population in the other district)." Section 5 Submission, Statement of Change, page 11. Once again, Dr. McDonald has used two counting methods. Dr. McDonald criticized the number of *split* VTDs in the Enacted Plan in his first report, but his latest report does not mention that number and instead counts the number of times VTDs are *split*. Thus, Dr. McDonald's first report counted a VTD split into two districts as one "split VTD," his latest report counts it as two "VTD splits."

Table 13. Split VTDs in Enacted Plan and Alternative Plan

Split VTDs affecting population [Locality]	Enacted Plan (Districts)	Plaintiffs Alternative Plan (Districts)
Remington [Fauquier]	(1, 5)	(1, 5)
Lee Hill [Spotsylvania]	(1, 7)	(1, 7)
Buckland Mills [Prince William]	(1, 10)	(1, 10)
Machen [Hampton]	(2, 3)	
Rives [Prince George]	(3, 4)	(3, 4)
404 [Richmond City]	(3, 7)	(3, 7)
New London Academy [Bedford]	(5, 6)	(5, 6)
Mount Olivet [Henry]	(5, 9)	(5, 9)
Saint Albans [Fairfax County]	(8, 11)	(8, 11)
Old Mill [Fairfax County]	(10, 11)	(10, 11)
One [Portsmouth]		(2, 3)
Total	**10**	**10**

Split VTDs affecting population [Locality]	Enacted Plan (Districts)	Plaintiffs Alternative Plan (Districts)
Roberts B [James City]	(1, 3)	(1, 3)
Riverside [Newport News]	(2, 3)	
Warwick [Newport News]	(2, 3)	
Hilton [Newport News]	(2, 3)	
Deep Creek [Newport News]	(2, 3)	
Bartlett [Isle of Wight]	(3, 4)	(3, 4)
Carrollton [Isle of Wight]	(3, 4)	(3, 4)
Rushmere [Isle of Wight]	(3, 4)	(3, 4)
Ebenezer [Suffolk]	(3, 4)	(3, 4)
Bennetts Creek [Suffolk]	(3, 4)	(3, 4)
Harbour View [Suffolk]	(3, 4)	(3, 4)

Split VTDs affecting population [Locality]	Enacted Plan (Districts)	Plaintiffs Alternative Plan (Districts)
Magarity [Fairfax County]	(8, 11)	(8, 11)
Five [Portsmouth]		(2, 3)
Total	**12**	**9**

Even using Dr. McDonald's preferred measure of VTD splits, the Alternative Plan does not improve on the Enacted Plan. Dr. McDonald counts 44 VTD splits in the Enacted Plan and 38 VTD splits in the Alternative Plan. He hails this purported difference of 6 such splits as a significant factor in claiming that "these Alternative Districts better conform to traditional redistricting principles." 2/21/14 McDonald, page 5. In fact, however, a net of 6 such splits that Dr. McDonald identifies as different between the plans are in the "technically split" precincts involving no population. Where population is concerned, the numbers of split VTDs and VTD splits in the Enacted Plan *are the same* as the numbers of split VTDs and VTD splits in the Alternative Plan.

Even if the numbers supported Dr. McDonald's conclusion that the Alternative Plan meaningfully improves on the Enacted Plan with respect to splits, Dr. McDonald elevates localities and VTDs above other communities of interest that the Senate criteria directed should be treated on par with localities and VTDs. Under the Senate Criteria, the Benchmark Districts are "governmental jurisdictions" just like the localities and VTDs and communities of interest formed around congressional districts and

communities of interest are entitled to the same "weight" as localities and VTDs. Senate Criteria V.

Dr. McDonald also disregards that the vast majority of the split localities in the Enacted Plan merely preserve preexisting split localities from the Benchmark Plan. The Enacted Plan's splits, therefore, respect communities of interest formed around the Benchmark Districts. By contrast, the Alternative Plan creates a new split dividing a portion of Portsmouth – which was not split in the Benchmark Plan – away from both the rest of Portsmouth and the rest of Benchmark District 3, where it formed part of a community of interest.

Contiguity

There is no dispute that the Enacted Plan satisfied the traditional redistricting criterion that the districts be contiguous. In drawing the Enacted Plan, the General Assembly decided that "contiguity by water" even without a connecting bridge "is sufficient" to satisfy the contiguity requirement. Senate Criteria III. Dr. McDonald indicated in his first report that contiguity by water without a connecting bridge was not sufficient, but instead indicative of a racial gerrymander. 12/6/13 McDonald, page 8. Alternative District 3 is contiguous across the James River without a connection in two places." 2/21/14 McDonald, page 7. The Alternative Plan thus achieves contiguity in District 3 exactly the same way as the Enacted Plan.

The Alternative Plan is Less Consistent with Certain Traditional Redistricting Principles Than the Enacted Plan

Dr. McDonald does not mention several traditional redistricting criteria identified by the Virginia Senate – including preservation of cores of districts, incumbency protection and compliance with the Voting Rights Act – under which the Alternative Plan performs worse than the Enacted Plan.

Preservation of Cores and Uniting of Political Communities of Interest

Preserving the cores of benchmark districts maintains communities of interest, facilitates better communication between citizens and their elected representatives, and protects incumbent representatives. Preservation of cores can be measured as a percentage of voters in a benchmark district who remain in the enacted district.

Table 14. Preservation of Cores of the Benchmark Districts

Enacted Plan		Plaintiffs Alternative Plan	
District	Percent Retained	District	Percent Retained
1	76.5	1	76.5
2	85.0	2	82.5
3	83.1	3	69.2
4	96.2	4.	96.2
5	89.8	5	89.8
6	91.5	6	91.5
7	88.1	7	88.1
8	85.4	8	85.4
9	90.2	9	90.2

10	89.2	10	89.2
11	71.2	11	71.2
Average	86.0	Average	84.5

The Enacted Plan preserves between 71% and 96% of the cores of the Benchmark districts, and preserves 83% or more of the cores of 9 of the 11 districts, including District 3. The Enacted Plan preserves 85% of the core of District 2 and 83% of the core of District 3.

The Alternative Plan performs significantly worse than the Enacted Plan on this criterion. The Alternative Plan preserves only 69.2% of the core of District 3, down from 83% in the Enacted Plan. In other words, Alternative District 3 would be the *worst performing* district in terms of preservation of cores in either the Enacted or the Alternative Plan. Dr. McDonald offers no explanation as to why the only majority-minority district in Virginia should be entitled to less continuity and respect for incumbency protection than every other district.

Protection of Incumbents

The Senate Criteria included the factor of "incumbency considerations." Senate Criteria V. This factor encompasses not just preserving the cores of districts but also strengthening incumbents politically. As explained, the Enacted Plan respects this factor significantly, while the Alternative Plan undermines it, particularly in District 2, where Congressman Rigell would be gravely weakened in his reelection prospects.

Compliance with the Voting Rights Act

The Senate Criteria treated compliance with the Voting Rights Act, "including compliance with protections against unwarranted retrogression or dilution of racial or ethnic minority voting strength," as the highest priority for the Enacted Plan after compliance with the Constitutional equal-population requirement. Senate Criteria II. I understand that a redistricting plan complies with Section 5 only if it does not diminish the ability of minority voters to elect their candidates of choice.

The Enacted Plan increased District 3's Black VAP on both of Dr. McDonalds' preferred measures 3.2% (exclusive) and 3.3% (inclusive). 2/21/14 McDonald, page 8. The Enacted Plan thus did not diminish the ability of black voters to elect their candidates of choice. The Enacted Plan received preclearance from the Department of Justice.

In 2011, Virginia was one of the first states to complete its statewide legislative redistricting and seek Section 5 preclearance from the Department of Justice. The General Assembly passed a redistricting plan for the House of Delegates which required preclearance for the 2011 elections. The benchmark House of Delegates plan had 12 districts in which African-Americans formed a majority of the total and voting age populations. Many of those districts were located in the geography covered by Congressional District 3. During the redistricting process, the House of Delegates considered a number of proposed plans that preserved the 12 majority-black districts. Some of these alternative plans had Black VAP below 55%. House of Delegates Section 5 Submission, Statement of Minority Impact, page 5.

But the House of Delegates plan that the General Assembly enacted had a Black VAP of above 55% in all 12 majority-black districts – including the districts within Congressional District 3. This required increasing the Black VAP in some of the 12 majority-black benchmark districts from the Black VAP level at the time of the 2010 census. Eight of the 12 members of the House of Delegates Black Caucus voted in favor of the Enacted House of Delegates plan. House of Delegates Section 5 Submission, Statement of Minority Impact, page 5.

Thus, the General Assembly enacted, with strong support of bipartisan and black legislators, a House of Delegates redistricting plan with a 55% Black VAP as the floor for black-majority districts subject to Justice Department preclearance under Section 5, including districts within the geography covered by Congressional District 3. The General Assembly therefore had ample reason to believe that legislators of both parties, including black legislators, viewed the 55% black VAP for the House of Delegates districts as appropriate to obtain Section 5 preclearance, even if it meant raising the Black VAP above the levels in the benchmark plan. The General Assembly acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the District 3 Black VAP at 56.3%.

The Alternative Plan, by contrast, decreases District 3's Black VAP by 2.9% and drops it to a razor-thin majority of 50.2% (exclusive) and 51% (inclusive). These levels are below the 55% that the General Assembly found appropriate to comply with Section 5 for House Districts.

Dr. McDonald states that "a racial bloc voting analysis" is required to prove what Black VAP is necessary to comply the Voting Rights Act. 1/20/14 McDonald, page 11. Dr. McDonald provides no such analysis of the Alternative Plan. Thus Dr. McDonald cannot – and does not – opine that the Alternative Plan could or would have received preclearance under Section 5.

Therefore the Alternative Plan would have presented obstacles to obtaining Section 5 preclearance that the Enacted Plan did not present. The Alternative Plan drops District 3's Black VAP well below the 55% that the General Assembly believed was appropriate to obtain preclearance for House Districts and decreases District 3's Black VAP to a razor-thin majority below the Benchmark Black VAP level. Had the Alternative Plan been before it, the General Assembly had ample reason to prefer the Enacted Plan, which increased District 3's Black VAP above 55% and faced none of these hurdles to achieving Section 5 preclearance.

The Alternative Plan Does Not Bring About Significantly Greater Racial Balance Than the Enacted Plan

I have been asked to analyze whether the Alternative plan brings about "significantly greater racial balance" than the Enacted Plan. As I understand it, the purpose of this requirement is to cure the alleged racial gerrymander and turn the gerrymandered district into one that is not racially identifiable. The Alternative Plan fails that purpose because it preserves District 3 as a racially identifiable majority-black district on both of

Dr. McDonald's Black VAP measurements. The Alternative Plan District 3 replaces a black-majority district with a black-majority district and in doing so would not seem to cure the alleged racial predominance that Dr. McDonald criticizes in the Enacted Plan, including the changes to the Benchmark District 3 that the Alternative Plan replicates.

The Enacted Plan is not a Racial Gerrymander

Based on my review and analysis of the available data discussed throughout this report, I also conclude that the Enacted Plan is not a racial gerrymander. In my opinion, politics rather than race predominated and the Enacted Plan is consistent with traditional redistricting principles, including the criteria identified by the Virginia Senate and followed by the General Assembly.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on March 14, 2014 in Fairfax, Virginia.

John B. Morgan

Table 7. Benchmark and Enacted Districts with 2008, 2012 Presidential Data

		Benchmark		Enacted		Difference		
CD	Current Party	Rep. Pres. '08	Dem. Pres. '08	Rep. Pres. '08	Dem. Pres. '08	DIFF Rep. Pres. '08	DIFF Dem. Pres. '08	Change
1	R	52.5%	46.6%	53.3%	45.8%	0.8%	-0.8%	More R
2	R	49.5%	49.5%	49.7%	49.3%	0.2%	-0.2%	More R
3	D	24.7%	74.6%	21.8%	77.6%	-3.0%	3.0%	More D
4	R	49.9%	49.3%	51.3%	48.0%	1.4%	-1.4%	More R
5	R	51.8%	47.3%	52.2%	46.8%	0.4%	-0.4%	More R
6	R	57.8%	41.2%	57.7%	41.2%	0.0%	0.0%	Neither
7	R	54.0%	45.2%	56.3%	42.8%	2.4%	-2.4%	More R
8	D	31.9%	67.2%	32.8%	66.3%	0.9%	-0.9%	More R
9	R	59.3%	39.2%	58.9%	39.7%	-0.5%	0.5%	More D
10	R	47.7%	51.5%	49.6%	49.6%	1.9%	-1.9%	More R
11	D	43.6%	55.6%	38.5%	60.7%	-5.2%	5.1%	More D

Table 7. Benchmark and Enacted Districts with 2008, 2012 Presidential Data

		Benchmark		Enacted		Difference		
CD	Current Party	Rep. Pres. '12	Dem. Pres. '12	Rep. Pres. '12	Dem. Pres. '12	DIFF Rep. Pres. '12	DIFF Dem. Pres. '12	Change
1	R	52.0%	46.6%	52.9%	45.7%	1.0%	-1.0%	More R
2	R	48.2%	50.3%	48.6%	50.0%	0.3%	-0.3%	More R
3	D	23.3%	75.5%	20.0%	78.8%	-3.3%	3.3%	More D
4	R	48.6%	50.3%	50.1%	48.7%	1.5%	-1.6%	More R
5	R	52.0%	46.4%	52.5%	45.9%	0.6%	-0.5%	More R
6	R	58.7%	39.5%	58.8%	39.4%	0.1%	-0.1%	More R
7	R	54.5%	44.1%	56.9%	41.7%	2.4%	-2.5%	More R
8	D	30.5%	68.2%	31.0%	67.8%	0.5%	-0.5%	More R
9	R	63.9%	34.1%	63.0%	34.9%	-0.8%	0.8%	More D
10	R	48.0%	50.6%	49.9%	48.7%	1.9%	-1.8%	More R
11	D	41.5%	57.2%	36.4%	62.3%	-5.2%	5.1%	More D

Table 8. Population Movement Between Benchmark and Enacted Districts with 2008, 2012 Presidential Data

Benchmark to Enacted District	Population	Rep. Pres. '08 %	Dem. Pres. '08 %	Oth. Pres. '08 %		Rep. Pres. '12 %	Dem. Pres. '12 %	Oth. Pres. '12 %
1-to-3	23,288	39%	60%	1%		33%	66%	1%
3-to-1	7,351	24%	75%	0%		23%	76%	1%
2-to-3	27,917	35%	64%	1%		30%	69%	1%
3-to-2	25,501	52%	47%	1%		50%	48%	1%
4-to-3	35,447	13%	86%	1%		11%	88%	1%
3-to-4	5,713	46%	53%	1%		44%	55%	1%
3-to-7	20,217	63%	36%	1%		64%	34%	1%
7-to-3	36,106	14%	85%	1%		13%	86%	1%

Table 9. Benchmark and Alternative Districts with 2008, 2012 Presidential Data

		Benchmark		Plaintiffs' Alt.		Difference		
CD	Cur–rent Par–ty	Rep. Pres. '08	Dem. Pres. '08	Rep. Pres. '08	Dem. Pres. '08	DIFF Rep. Pres. '08	DIFF Dem. Pres. '08	Change
1	R	52.5%	46.6%	53.3%	45.8%	0.8%	-0.8%	More R
2	R	49.5%	49.5%	44.3%	54.9%	-5.3%	5.3%	More D
3	D	24.7%	74.6%	27.8%	71.5%	3.1%	-3.2%	More R
4	R	49.9%	49.3%	51.3%	48.0%	1.4%	-1.4%	More R
5	R	51.8%	47.3%	52.2%	46.8%	0.4%	-0.4%	More R
6	R	57.8%	41.2%	57.7%	41.2%	0.0%	0.0%	Neither
7	R	54.0%	45.2%	56.3%	42.8%	2.4%	-2.4%	More R
8	D	31.9%	67.2%	32.8%	66.3%	0.9%	-0.9%	More R
9	R	59.3%	39.2%	58.9%	39.7%	-0.5%	0.5%	More D
10	R	47.7%	51.5%	49.6%	49.6%	1.9%	-1.9%	More R
11	D	43.6%	55.6%	38.5%	60.7%	-5.2%	5.1%	More D

Table 14. Preservation of Cores of the Benchmark Districts

Enacted Plan		Plaintiffs' Alternative Plan	
District	Percent Retained	District	Percent Retained
1	76.5	1	76.5
2	85.0	2	82.5
3	83.1	3	69.2
4	96.2	4	96.2
5	89.8	5	89.8
6	91.5	6	91.5
7	88.1	7	88.1
8	85.4	8	85.4
9	90.2	9	90.2
10	89.2	10	89.2
11	71.2	11	71.2
Average	86.0	Average	84.5

PRIVILEGES AND ELECTIONS
REDISTRICTING
SENATE HEARING

BEFORE:	DELEGATE MARK COLE, CHAIRMAN
PLACE:	COMMONWEALTH OF VIRGINIA GENERAL ASSEMBLY BUILDING RICHMOND, VIRGINIA 23218
DATE:	APRIL 4, 2011
TIME:	2:00 PM

* * *

[Page 12]

DELEGATE JONES: And so what we were able to do was to rotate two precincts from the 92nd back into the 95th, and that took the 92nd out of Hampton. And that switch actually was done very easily by giving back a whole precinct that the 92nd had lost to the 91st, and picked up two split precincts that were split in the introduced bill. So that is what we did in the peninsula and for Delegate Spruill.

Then, last week, we had a meeting with some gentlewomen from Richmond City and on Southside. So Delegate Dance, if you would like to give some details as to what we looked at and what we considered, and I'll give a little more detail, if you like.

DELEGATE DANCE: Thank you, Delegate Jones. There were some issues between Delegate McClellan's area and Delegate Carr, and with some help from you and working with Delegate Loupassi,

they were able to make some changes that would strengthen their district, minority district.

In the twelve minority districts that we have around the state, two of the districts that we're talking about, two minority districts, one held by an African American, one held by a Euro-American, Delegate Clark, are still minority districts. Whether they serve or others serve, or others have an opportunity, depends on how strong it is.

In trying to get that straight, at least 55 percent performing, voting performing in districts, it required some shifting between the three. So I know Delegate McClellan was at 50 percent, currently she's at a 50 percent district, as far as African American district. For Delegate McClellan, that's not an issue. Even though she's an African American, she can win that district. But if Delegate McClellan leaves that and goes on to become a State Representative, state-wide representative, Congress or whatever, could another African American minority person, if you will, still be able to keep that as one of the 12 minority districts? Not so.

So, in order to make it stronger, so that that would be a position that an African American could hold, then there needs to be some shifts. And the three parties, the delegates, are in agreement and we've made that transition.

DELEGATE JONES: And I would like to add that, in the process of doing that, we actually took Delegate Massie and Delegate O'Bannon completely out of Henrico. We were able to do that, and that left Delegate McClellan with just one precinct in Henrico. I think that then gives the City of Richmond, they

know that they don't have a split representation in that regard. That move allowed us to move those two individuals out of Richmond City, and then make it more compact and contiguous, I belive, at the end of the day.

DELEGATE DANCE: Yes.

* * *

PRIVILEGES AND ELECTIONS
REDISTRICTING
SENATE HEARING

BEFORE: SENATOR JANET HOWELL, CHAIRWOMAN

PLACE: COMMONWEALTH OF VIRGINIA
GENERAL ASSEMBLY BUILDING
RICHMOND, VIRGINIA 23218

DATE: APRIL 7, 2011

TIME: 2:00 p.m.

* * *

[Page 14]

SENATOR WATKINS: We feel that it was extremely important, because of the fact that we are having to comply with the Voting Rights Act, that we pay particular attention to the deviation and to tighten it down as far as we could. If you look at the progression over the past four decades, we have managed to tighten that down every decade. I think that the appropriate number of a half a percent can be done, and should be done, in order to accommodate that One Person/One Vote.

I think it also goes without saying that we went out of our way to make sure that we maintained and did not have a specific retrogression with regards to the Voting Rights Act in the minority districts. If you will look at the different separate minority districts, you will find that the retrogressions, even in the percentages, were extremely low on ours. We had only three where there was any; one was a half a

percent, the other was two/thirds of a percent, and the 7th district, I believe, was, 3.66 percent, which was significantly below what the original plan was that you all had put forward. I do not know the comparison.

SENATOR MCEACHIN: Madam Chair.

MADAM CHAIR: Senator McEachin.

SENATOR MCEACHIN: Senator Watkins.

SENATOR WATKINS: Yes?

SENATOR MCEACHIN: I guess I'm concerned with the comment that you just made, relative to the Voting Rights Act of minority populations. I would suggest to you that currently, the current map—not the one that says "The Howell Plan," the current map that we're operating under that was drawn ten years ago—is packed with more African American voters than are necessary for African American voters to elect a candidate of their choice. In my view, the current map wastes minority votes.

Our map retains the majority African American Senate districts as effective-opportunity districts for African American voters. Our plan not only does not waste African American voting strength, it enables African American voters to have their voice in other districts.

When I look at your plan, you have put districts of 57.7 percent African American, 55.4 percent African American, 55.2 percent African American, 56.1 percent African American, and actually two that are at 56.1 percent African American.

Once again, I would suggest that your plan does exactly what the Voting Rights Act warns us not to

do, and that is that it packs African Americans in such a fashion as they are not able to fully express their voting preferences.

In fact, Senator, ten years ago, in my judgement, the plan that was passed put us all on five individual plantations, and I would just as soon move off of those plantations.

SENATOR WATKINS: Well, my response, Madam Chair, would be if I felt, if I thought that the Justice Department would approve minority-majority districts at less than fifty percent, we probably would have gone there. I think it's important that the voting-age population be there in order to assure that the representation for the minority-majority districts is given an opportunity to elect one of their own.

SENATOR MCEACHIN: Madam Chair.

MADAM CHAIR: Senator McEachin.

SENATOR MCEACHIN: I know nothing in the Voting Rights Act that says the African American voting-age population has to be north of 50.1 percent. Are you able to show me case law—

SENATOR WATKINS: No, sir.

SENATOR MCEACHIN:—or anything to suggest anything to the contrary?

SENATOR WATKINS: You are much more the legal scholar than I, sir.

SENATOR MCEACHIN: One further question, Madam Chair.

MADAM CHAIR: Senator McEachin.

SENATOR MCEACHIN: That being the case, why would you then want to pack African American

districts so that African American voters aren't able to have influence in other districts?

SENATOR WATKINS: I would take exception to the fact that we wanted to pack. We tried to reduce the number, the voting-age population numbers, from the 2000 redistricting, the 2000 census. We tried to make sure that as many districts as possible would come down, so that, in fact, the numbers could be more properly utilized, as you have spoken, as you have enumerated.

At the same time, it's a delicate balance, as I can well imagine you realize, to make certain that there are adequate numbers to elect minority members to those seats. There was no intention at any time on any part of myself or Senator Vogel to do any packing of minority members.

SENATOR MCEACHIN: Thank you, Madam Chair.

SENATOR VOGEL: Madam Chair.

MADAM CHAIR: Yes, Senator Vogel.

SENATOR VOGEL: I would like to just not—I don't need to ask Senator Watkins a question, but I would like to speak to that, if I might, on the issue of Section 5.

MADAM CHAIR: Sure.

SENATOR VOGEL: When Senator Watkins and I undertook to do a map, we were basically going through the same exercises that anybody would go through, and that was to come up with a map that we felt was as clean as possible, was as considerate of the parameters set forth in the law, and trying, really, as a test, to see, could we get, for example, half

a percent deviation districts that we believed were—that met those criteria.

So when it came to Section 5—I just want to be very clear about this—that we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0. And I think there is a legitimate reason for that, and that reason is if you want to afford minority districts the opportunity to elect a minority to the House or to the Senate. If you go back and you look over time in cases where legislators have argued that you can go below that percentage. the outcomes have been, in fact, pretty stark. And in these cases, African Americans have not been elected.

And I have—if you'll just bear with me for a moment, I'm going to provide you with a couple of examples. Senator Lucas in 2001 had a special election in the 4th Congressional District, where the district was over forty percent African American, but not over fifty percent, that failed to elect Senator Lucas. And while that's a much lower number than we're talking about, that's relevant.

In 1991, where her district was 56 percent black voting-age population, she was—

MADAM CHAIR: Excuse me. Was that congressional?

SENATOR VOGEL: Yes, that was congressional.

MADAM CHAIR: Thank you.

SENATOR VOGEL: In 1991 Senator Lucas had an election where her district was 56 percent black

voting-age population, or BVAP, and she won that race. But, bear in mind, she only won that with 51.8 percent of the vote. So that's 56 percent.

In Georgia in 2002—and I think this is the one that's most instructive, and this is the one that we considered carefully in trying to determine, you know, are we going to break any new ground here at 55 percent, or should we not be consistent with the law and consistent with what the Department of Justice has said. That is, in Georgia, in 2002, the Senate majority plan dropped the black voting-age population of the Black Senate majority leader's district to 51 percent BVAP, that's black voting-age population, and dropped the black voter registration percentage to about 49.5 percent.

Here is what's critical there. The Senate majority leader lost his election after he testified that his district would, in fact, elect an African American. I think that's very relevant here. There was no magic in us trying to break any new ground here. We were just simply following what, I believe, is not subject to any question; that is, as of today, the lowest percentage that the Department of Justice has ever approved is 55.0.

Thank you very much.

SENATOR MCEACHIN: Madam Chair.

MADAM CHAIR: Senator McEachin.

SENATOR MCEACHIN: In response to that—and I'll be happy to share with you this information once I get my hands on it—but first of all, I take issue with the fact that the lowest number that has ever been approved by the DOJ is 55.5. That's number one.

Number two, Madam Chair, what I would suggest to the Committee is that the comments that my good friend has just made about the Voting Rights Act has sort of turned the matter on its head. The purpose of the Voting Rights Act is not—and I repeat not—to elect African Americans. The purpose of the Voting Rights Act is to give African Americans the opportunity to elect a candidate of their choice. The fact that the Senator from Georgia that you referenced lost the election simply means that that was not the candidate of their choice. That does not mean that the number 50.1 percent, or whatever the number was that you cited, was too low.

I would also suggest that you look at recent Virginia history and understand. Congressman Scott, when he was first elected to the General Assembly, was elected from a majority white district. I would also submit to you that, as I understand it—if I'm wrong, someone please correct me—that an African American mayor was elected in Portsmouth, elected in Newport News, and elected in Hampton, none of which have majority African American populations, and yet all were successfully elected mayor of their cities.

So what I would suggest to you is that the magic number that you're throwing out—or that you're suggesting, pardon me—is, in fact, not what is required. What is required is that districts allow African Americans to select a candidate of their choice.

SENATOR VOGEL: Madam chair.

MADAM CHAIR: Senator Vogel.

SENATOR VOGEL: I would just like to respond, if I may, in addressing that question. I don't disagree with my colleague's comments about what the underlying mission is of Section 5. There is no question. It is to ensure that that population, the minority population, has the ability to elect a candidate of their choice. That is absolutely true.

But it has been the position of the Department of Justice, and I will speak to this very confidently, that 55.0 is the percentage that they believe is what is qualified, and that has been, at least in the past to date, their position regarding what it would take to be able to elect a candidate of your choice, whomever that might be.

Thank you, Madam Chair.

MADAM CHAIR: Thank you.

Senator Watkins, did you have more in your presentation?

SENATOR WATKINS: Yes, I did.

MADAM CHAIR: All right. Go ahead.

SENATOR WATKINS: I think that it's important. You know, this is an important statement of what we are trying to do here. There's no question about that. We have to comply with the law. But, also, this is Virginia. These are our citizens that we're dealing with, in terms of their representation. And it's all of the citizens. It's not one community or another.

* * *

[Page 27]

SENATOR BARKER: Madam Chair, just a couple of comments, because I think the discussion on the Voting Rights Act is very significant.

My understanding is that there have been a number of districts approved with less than 55 percent African American, and, in fact, many of the districts we're looking at right now are less than 55 percent African American population, voting-age population, at this particular time.

I think it's also important to point out that we do have a number of individuals, African Americans, who have been elected in districts that are far lower than fifty percent, than 55 percent African American voting-age population. Just in Northern Virginia alone I can think of many, many officials in districts that are less than 25 percent, and many incidents of less than ten percent who have been elected, including the Mayor of the City of Alexandria, two members of the House of Delegates, former County Board Chair, the Sheriff of Prince William County, School Board members at large, within Fairfax County School Board members, members from individual districts.

So I think it's important to ensure that African Americans have a chance to have influence in districts beyond just the Voting Rights Act Districts, and I think they certainly are exercising that to a substantial degree now.

I think it is important that we not pack African American voters into a very, very limited number of districts, or into a majority in any way that to some extent disenfranchises their opportunity to have influence in other districts.

* * *

COMMONWEALTH OF VIRGINIA

Office of the Attorney General

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May 10, 2011

UPS OVERNIGHT DELIVERY

Mr. Chris Herren
Chief, Voting Section
Civil Rights Division
Room 7254-NWB
Department of Justice
1800 G Street, N.W.
Washington, D.C. 20006

Re: Submission under Section 5 of the Voting Rights Act: Chapter 1, 2011 Virginia Acts of Assembly (Special Session I) Redistricting the Virginia General Assembly's House of Delegates and Senate.

Dear Mr. Herren:

Simultaneous with the filing of suit in the United States District Court for the District of Columbia seeking judicial preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the Commonwealth submits the enclosed information – material sufficient to serve as a complete submission

for administrative preclearance under Section 5. The Commonwealth further requests that you preclear Chapter 1, 2011 Va. Acts (Special Session 1) thereby mooting the suit. Chapter 1 redistricts the House of Delegates and the Senate of the Virginia General Assembly as mandated by Article II, Section 6 of the Constitution of Virginia. It amends the Code of Virginia by adding a section numbered 24.2-303.3, by adding in Article 2 of Chapter 3 of Title 24.2 a section numbered 24.2-304.03, and by repealing §§ 24.2-303.1, 24.2-303.2, 24.2-304.01, and 24.2-304.02 of the Code of Virginia.

This submission includes the information required under 28 C.F.R. §§ 51.26 and 51.27, as well as supplemental information permitted under § 51.28. A portion of the information is provided on DVDs. The DVD accompanying Attachment 10 contains maps not available online. The DVD accompanying Attachment 11 contains election returns from the past 10 years. The DVD accompanying Attachment 17 includes the floor debates regarding Chapter 1.

* * *

[Page 28]

Senate Bill 5002 contains three districts with African-American populations of 30 percent of more and one district with African-American populations of 25 percent or more compared with one 30-plus district and five 25-plus districts in Chapter 1. Table 5.2 shows the districts that are over 25 percent minority in Senate Bill 5002 in relation to Chapter 1.

The third alternative plan is the floor substitute for House Bill 5001 that was offered by Senator John C. Watkins. Tables 5.1 and 5.2 include the relevant

information with regard to the anticipated impact of this plan. Briefly, the floor substitute, like Chapter 1, retained the five districts with a majority African-American total population, although the configurations of the districts were different. As compared to Chapter 1, this plan has the effect of concentrating African-American voters in these five districts to a much greater degree, increasing the total and voting age African-American populations in all five districts. The plan's district percentages for the total and voting age minority populations never goes lower than 55 percent and the plan's district percentages for the total and voting age minority populations are on average 3.8 percent more than those in Chapter 1.

The floor substitute contains one district with African-American populations of 30 percent of more and two districts with African-American populations of 25 percent or more compared with one 30-plus district and five 25-plus districts in Chapter 1. Table 5.2 shows the districts that are over 25 percent minority in this plan in relation to Chapter 1.

No alternative plans were proposed by the NAACP, the ACLU, or any other group purporting to represent the interests of minority voters. Four of the All five incumbent Democratic minority Senators representing the majority minority districts voted affirmatively for the passage of House Bill 5005/Chapter 1 as amended to include the Senate plan; Senator Locke did not vote on final passage. Additionally, all House members of the Legislative Black Caucus voted affirmatively for the passage of House Bill 5005/Chapter 1 after it was amended to include the Senate plan and was referred back to the

House, with exception of Delegate Jeion A. Ward, who voted against the bill; Delegate Roslyn C. Tyler, who was not present but who voted against House Bill 5005 as it left the House; and Delegates Roslyn R. Dance and Luke E. Torian, who did not vote on final passage but who voted for House Bill 5005 as it left the House.

* * *

From: Michael P. McDonald mmcdon@gmu.edu
Sent: Wednesday, March 23, 2011 4:45PM
To: Brian Cannon;
brian.rothenberg@gmail.com;
nicholashmueller@gmail.com
Subject: 3rd district variant

I've shared a congressional plan called "Dr. McDonald 3rd District Variant" which demonstrates how to create a plan that has a 3rd congressional district more than 52.2% + black VAP and connects the eastern shore with a bridge to the Newport News area. These are two absolutely MUST requirements for the plan to be considered by the commission -- a 53.2%+ black VAP district and connecting land by bridges. It may be that there is a different configuration that does not connect Newport News with the eastern shore via a bridge, but I doubt it. Bringing the eastern shore district into the 3rd to the south of Hampton Roads is likely not a viable solution. This is a rough draft plan. As you will see, the districts' population still needs further balancing.

==========

Dr. Michael P. McDonald
Associate Professor, George Mason University
Non-Resident Senior Fellow, Brookings Institution

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55% DEMOCRATIC VTDs
Enacted Plan

	In Enacted District 3	In Enacted District 3 And Bench-mark District 3	In Enacted District 3 But Not Bench-mark District 3	In Local-ities Adjacent To Enacted District 3
Number of VTDs at least 55% Democrat	189	166	23	116
Average Democrat Vote Percentage	80.9	81.6	75.6	65.4
Average NH BVAP Percentage	59.5	60.7	50.8	43.5

Alternative Plan

	In Alternative District 3	In Alternative District 3 And Benchmark District 3	In Alternative District 3 But Not Benchmark District 3	In Localities Adjacent To Alternative District 3
Number of VTDs at least 55% Democrat	160	136	24	145
Average Democrat Vote Percentage	80.6	81.9	73.0	68.8
Average NH BVAP Percentage	59.8	61.6	49.3	46.4

55% DEMOCRATIC VTDs
Enacted Plan

	In Enacted District 3	In Enacted District 3 And Bench-mark District 3	In Enacted District 3 But Not Bench-mark District 3	In Local-ities Adjacent To Enacted District 3
Number of VTDs at least 55% Democrat	189	160	29	116
Average Democrat Vote Percentage	80.9	81.5	77.6	65.4
Average NH BVAP Percentage	59.5	60.1	56.3	43.5

Alternative Plan

	In Alternative District 3	In Alternative District 3 And Benchmark District 3	In Alternative District 3 But Not Benchmark District 3	In Localities Adjacent To Alternative District 3
Number of VTDs at least 55% Democrat	160	130	30	145
Average Democrat Vote Percentage	80.6	81.8	75.5	68.8
Average NH BVAP Percentage	59.8	60.9	55.0	46.4

FEDERAL REGISTER

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Part III

Department of Justice

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice

DEPARTMENT OF JUSTICE

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice

AGENCY: Office of the Assistant Attorney General, Civil Rights Division, Department of Justice.

ACTION: Notice.

SUMMARY: The Attorney General has delegated responsibility and authority for determinations under Section 5 of the Voting Rights Act to the Assistant Attorney General, Civil Rights Division, who finds that, in view of recent legislation and judicial decisions, it is appropriate to issue guidance concerning the review of redistricting plans submitted to the Attorney General for review pursuant to Section 5 of the Voting Rights Act.

FOR FURTHER INFORMATION CONTACT:

T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, United States Department of Justice, Washington, DC 20530, (202) 514–1416.

SUPPLEMENTARY INFORMATION: Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, requires jurisdictions identified in Section 4 of the Act to obtain a determination

from either the Attorney General or the United States District Court for the District of Columbia that any change affecting voting which they seek to enforce does not have a discriminatory purpose and will not have a discriminatory effect.

Beginning in 2011, these covered jurisdictions will begin to seek review under Section 5 of the Voting Rights Act of redistricting plans based on the 2010 Census. Based on past experience, the overwhelming majority of the covered jurisdictions will submit their redistricting plans to the Attorney General. This guidance is not legally binding; rather, it is intended only to provide assistance to jurisdictions covered by the preclearance requirements of Section 5.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c

Following release of the 2010 Census data, the Department of Justice expects to receive several thousand submissions of redistricting plans for review pursuant to Section 5 of the Voting Rights Act. The Civil Rights Division has received numerous requests for guidance similar to that it issued prior to the 2000 Census redistricting cycle concerning the procedures and standards that will be applied during review of these redistricting plans. 67 FR 5411 (January 18, 2001). In addition, in 2006, Congress reauthorized the Section 5 review requirement and refined its definition of some substantive standards for compliance with Section 5. In view of these developments, issuing revised guidance is appropriate.

The "Procedures for the Administration of Section 5 of the Voting Rights Act," 28 CFR Part 51, provide detailed information about the Section 5 review process. Copies of these Procedures are available upon request and through the Voting Section Web site (*http://www.usdoj.gov/crt/voting*). This document is meant to provide additional

guidance with regard to current issues of interest. Citations to judicial decisions are provided to assist the reader but are not intended to be comprehensive. The following discussion provides supplemental guidance concerning the following topics:

- The Scope of Section 5 Review;
- The Section 5 Benchmark;
- Analysis of Plans (discriminatory purpose and retrogressive effect);
- Alternatives to Retrogressive Plans; and
- Use of 2010 Census Data.

The Scope of Section 5 Review

Under Section 5, a covered jurisdiction has the burden of establishing that a proposed redistricting plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [Section 4(f)(2) of the Act]" (i.e., membership in a language minority group defined in the Act). 42 U.S.C 1973c(a). A plan has a discriminatory effect under the statute if, when compared to the benchmark plan, the submitting jurisdiction cannot establish that it does not result in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 125, 141 (1976).

If the proposed redistricting plan is submitted to the Department of Justice for administrative review, and the Attorney General determines that the jurisdiction has failed to show the absence of any discriminatory purpose or retrogressive effect of denying or abridging the right to vote on account of race, color or membership in a language minority group defined in the Act, the Attorney General will interpose an objection. If, in the alternative, the jurisdiction seeks a declaratory judgment from the United States District Court for the District of Columbia, that

court will utilize the identical standard to determine whether to grant the request; i.e., whether the jurisdiction has established that the plan is free from discriminatory purpose or retrogressive effect. Absent administrative preclearance from the Attorney General or a successful declaratory judgment action in the district court, the jurisdiction may not implement its proposed redistricting plan.

The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630 (1993), or on the grounds that it violates Section 2 of the Voting Rights Act. The same standard applies in a declaratory judgment action. Therefore, jurisdictions should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to that plan under other statutes by the Department of Justice or by private plaintiffs. 42 U.S.C. 1973c(a); 28 CFR 51.49.

The Section 5 "Benchmark"

As noted, under Section 5, a jurisdiction's proposed redistricting plan is compared to the "benchmark" plan to determine whether the use of the new plan would result in a retrogressive effect. The "benchmark" against which a new plan is compared is the last legally enforceable redistricting plan in force or effect. *Riley v. Kennedy*, 553 U.S. 406 (2008); 28 CFR 51.54(b)(1). Generally, the most recent plan to have received Section 5 preclearance or to have been drawn by a Federal court is the last legally enforceable redistricting plan for Section 5 purposes. When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a Federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Texas v. United States*, 785 F Supp. 201 (D.D.C. 1992);

Mississippi v. Smith, 541 F. Supp. 1329, 1333 (D.D.C. 1982), appeal dismissed, 461 U.S. 912 (1983).

A plan found to be unconstitutional by a Federal court under the principles of Shaw v. Reno and its progeny cannot serve as the Section 5 benchmark, *Abrams v. Johnson*, 521 U.S. 74 (1997), and in such circumstances, the benchmark for Section 5 purposes will be the last legally enforceable plan predating the unconstitutional plan. Absent such a finding of unconstitutionality under Shaw by a Federal court, the last legally enforceable plan will serve as the benchmark for Section 5 review. Therefore, the question of whether the benchmark plan is constitutional will not be considered during the Department's Section 5 review.

Analysis of Plans

As noted above, there are two necessary components to the analysis of whether a proposed redistricting plan meets the Section 5 standard. The first is a determination that the jurisdiction has met its burden of establishing that the plan was adopted free of any discriminatory purpose. The second is a determination that the jurisdiction has met its burden of establishing that the proposed plan will not have a retrogressive effect.

Discriminatory Purpose

Section 5 precludes implementation of a change affecting voting that has the purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act. The 2006 amendments provide that the term "purpose" in Section 5 includes "any discriminatory purpose," and is not limited to a purpose to retrogress, as was the case after the Supreme Court's decision in *Reno v. Bossier Parish* (*"Bossier II"*), 528 U.S. 320 (2000). The Department will examine the circumstances surrounding the submitting authority's adoption of a submitted voting change, such as a redistricting plan, to determine whether

direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act.

Direct evidence detailing a discriminatory purpose may be gleaned from the public statements of members of the adopting body or others who may have played a significant role in the process. *Busbee v. Smith*, 549 F. Supp. 494. 508 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). The Department will also evaluate whether there are instances where the invidious element may be missing. but the underlying motivation is nonetheless intentionally discriminatory. In the *Garza* case. Judge Kozinski provided the clearest example:

Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however. that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Garza and United States v. County of Los Angeles, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part), *cert. denied*, 498 U.S. 1028 (1991).

In determining whether there is sufficient circumstantial evidence to conclude that the jurisdiction has not established the absence of the prohibited discriminatory purpose, the Attorney General will be guided by the Supreme Court's illustrative, but not exhaustive, list of those "subjects for proper inquiry in determining whether racially discriminatory intent

existed," outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977). In that case, the Court, noting that such an undertaking presupposes a "sensitive inquiry," identified certain areas to be reviewed in making this determination: (1) The impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266–68.

The single fact that a jurisdiction's proposed redistricting plan does not contain the maximum possible number of districts in which minority group members are a majority of the population or have the ability to elect candidates of choice to office, does not mandate that the Attorney General interpose an objection based on a failure to demonstrate the absence of a discriminatory purpose. Rather, the Attorney General will base the determination on a review of the plan in its entirety.

Retrogressive Effect

An analysis of whether the jurisdiction has met its burden of establishing that the proposed plan would not result in a discriminatory or "retrogressive" effect starts with a basic comparison of the benchmark and proposed plans at issue, using updated census data in each. Thus, the Voting Section staff loads the boundaries of the benchmark and proposed plans into the Civil Rights Division's geographic information system [GIS]. Population data are then calculated for each district in the benchmark and the proposed plans using the most recent decennial census data.

A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective

exercise of the electoral franchise" when compared to the benchmark plan. *Beer v. United States* at 141. In 2006, Congress clarified that this means the jurisdiction must establish that its proposed redistricting plan will not have the effect of "diminishing the ability of any citizens of the United States" because of race, color, or membership in a language minority group defined in the Act, "to elect their preferred candidate of choice." 42 U.S.C. 1973c(b) & (d). In analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.

Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination. 28 CFR 51.28(a). For example, census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar

information are very important to an assessment of the actual effect of a redistricting plan.

The Section 5 Procedures contain the factors that the courts have considered in deciding whether or not a redistricting plan complies with Section 5. These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented among different districts; whether minorities are overconcentrated in one or more districts; whether alternative plans satisfying the jurisdiction's legitimate governmental interests exist, and whether they were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and, whether the plan is inconsistent with the jurisdiction's stated redistricting standards. 28 CFR 51.56–59.

Alternatives to Retrogressive Plans

There may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting (e.g., residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable. In those circumstances, the submitting jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn.

In considering whether less-retrogressive alternative plans are available, the Department of Justice looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative plans

presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop illustrative alternative plans for use in its analysis, taking into consideration the jurisdiction's redistricting principles. If it is determined that a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the Attorney General will interpose an objection.

Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle. 52 FR 488 (Jan. 6, 1987). Similarly, preventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno* and related cases.

The one-person, one-vote issue arises most commonly where substantial demographic changes have occurred in some, but not all, parts of a jurisdiction. Generally, a plan for congressional redistricting that would require a greater overall population deviation than the submitted plan is not considered a reasonable alternative by the Department. For state legislative and local redistricting, a plan that would require significantly greater overall population deviations is not considered a reasonable alternative.

In assessing whether a less retrogressive plan can reasonably be drawn, the geographic compactness of a jurisdiction's minority population will be a factor in the Department's analysis. This analysis will include a review of the submitting jurisdiction's historical redistricting practices and district configurations to determine whether the alternative plan would (a) abandon those practices and (b) require highly unusual features to link together widely separated minority concentrations.

At the same time, compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria that require the jurisdiction to make

the least possible change to existing district boundaries, to follow county, city, or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression. In evaluating alternative or illustrative plans, the Department of Justice relies upon plans that make the least departure from a jurisdiction's stated redistricting criteria needed to prevent retrogression.

The Use of 2010 Census Data

The most current population data are used to measure both the benchmark plan and the proposed redistricting plan. 28 CFR 51.54(b)(2) (Department of Justice considers "the conditions existing at the time of the submission."); *City of Rome v. United States*, 446 U.S. 156, 186 (1980) ("most current available population data" to be used for measuring effect of annexations); *Reno v. Bossier Parish School Board*, 528 U.S. 320, 334 (2000) ("the baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied * * * .").

For redistricting after the 2010 Census, the Department of Justice will, consistent with past practice, evaluate redistricting submissions using the 2010 Census population data released by the Bureau of the Census for redistricting pursuant to Public Law 94–171, 13 U.S.C. 141(c). Thus, our analysis of the proposed redistricting plans includes a review and assessment of the Public Law 94–171 population data, even if those data are not included in the submission or were not used by the jurisdiction in drawing the plan. The failure to use the Public Law 94–171 population data in redistricting does not, by itself, constitute a reason for interposing an objection. However, unless other population data used can be shown to be more accurate and reliable than the Public Law 94–171 data, the Attorney General will consider the Public Law 94–171 data to measure the total population

and voting age population within a jurisdiction for purposes of its Section 5 analysis.

As in 2000, the 2010 Census Public Law 94–171 data will include counts of persons who have identified themselves as members of more than one racial category. This reflects the October 30, 1997, decision by the Office of Management and Budget [OMB] to incorporate multiple-race reporting into the Federal statistical system. 62 FR 58782–58790. Likewise, on March 9, 2000, OMB issued Bulletin No. 00–02 addressing "Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Enforcement." Part II of that Bulletin describes how such census responses will be allocated by Federal executive agencies for use in civil rights monitoring and enforcement.

The Department will follow both aggregation methods defined in Part II of the Bulletin. The Department's initial review of a plan will be based upon allocating any multiple-item response that includes white and one of the five other race categories identified in the response. Thus, the total numbers for "Black/African American," "Asian," "American Indian/Alaska Native," "Native Hawaiian or Other Pacific Islander" and "Some other race" reflect the total of the single-race responses and the multiple responses in which an individual selected a minority race and white race.

The Department will then move to the second step in its application of the census data to the plan by reviewing the other multiple-race category, which is comprised of all multiple-race responses consisting of more than one minority race. Where there are significant numbers of such responses, we will, as required by both the OMB guidance and judicial opinions, allocate these responses on an iterative basis to each of the component single-race categories for analysis. *Georgia v. Ashcroft*, 539 U.S. 461, 473, n.1 (2003).

As in the past, the Department will analyze Latino voters as a separate group for purposes of enforcement of the Voting Rights Act. If there are significant numbers of responses which report Latino and one or more minority races (for example, Latinos who list their race as Black/African-American). those responses will be allocated alternatively to the Latino category and the minority race category.

Dated: February 3. 2011

Thomas E. Perez,

Assistant Attorney General, Civil Rights Division

[FR Doc. 2011-2797 Filed 2-8-11; 8:45 a.m.]

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No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court for the Eastern District of Virginia

JOINT APPENDIX (VOLUME III OF III)

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TABLE OF CONTENTS

Page

VOLUME III

Transcript Excerpts of the Bench Trial, 3:13-cv-678, May 21, 2014 (E.D. Va.) 560

Transcript Excerpts of the Bench Trial, 3:13-cv-678, May 22, 2014 (E.D. Va.) 793

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAWN CURRY PAGE, et al.,	:	
	:	
Plaintiffs,	:	Civil Action No.:
vs.	:	3:13CV678
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	:	May 21, 2014
	:	
Defendants.	:	

COMPLETE TRANSCRIPT OF THE BENCH TRIAL
HEARD BEFORE: THE HONORABLE ALLYSON K. DUNCAN
THE HONORABLE LIAM O'GRADY
THE HONORABLE ROBERT E. PAYNE

* * *

[Page 25]

MICHAEL McDONALD,

a witness, called at the instance of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAMILTON:

Q Dr. McDonald, good morning. Can you please state your name for the record.

A Michael McDonald.

Q Mr. McDonald, where do you live?

A Fairfax, Virginia.

Q Is your house on the market?

A Yes, it is.

JUDGE PAYNE: Excuse me. How do you spell your name?

THE WITNESS: Michael—

JUDGE PAYNE: No, the last.

THE WITNESS: M-c-D-o-n-a-l-d.

JUDGE PAYNE: All right.

Q Why is that, sir, your house is on the market?

A Yes, I recently took a position at the University of Florida as a preeminent scholar.

JUDGE PAYNE: As a what?

THE WITNESS: Preeminent scholar.

JUDGE PAYNE: Will you move up a little bit and pull the mike to you. It will pick you up if you get it close enough.

Q Dr. McDonald, you are an expert for the plaintiffs in this litigation?

A I am.

Q Are you here to testify about your work and your reports?

A I am.

Q Thank you. Let's start with Plaintiffs' Exhibit 25. It's in the notebooks there in front of you. Just take a quick look at that.

JUDGE PAYNE: That's his CV.

MR. HAMILTON: That's correct, Your Honor.

JUDGE PAYNE: Do you agree he's an expert? Are you offering him as an expert in the area of what?

MR. HAMILTON: In the area of political science, Your Honor.

JUDGE PAYNE: Do you agree he's an expert in that discipline, Mr. Carvin?

MR. CARVIN: Yes, we do.

MR. MELIS: Yes, sir, Your Honor.

JUDGE PAYNE: He's accepted. We can go ahead. We've read his CV.

MR. HAMILTON: Thank you, Your Honor.

Q You are currently a professor where?

A George Mason University.

Q Have you attended law school?

A No.

Q Not a lawyer?

A No.

Q And your current position?

A Associate professor.

Q Could you describe briefly for the Court the work you've done with respect to redistricting either as a consultant or as an expert witness?

A I've been involved in redistricting as a consultant or expert witness in 14 states.

Q Have you worked with both Republicans and Democrats?

A At times, yes.

Q You and I have worked together before; is that right?

A Correct.

Q And when was that?

A That was in recent litigation in Ohio.

Q Have you worked with any of the other lawyers in this courtroom?

A Yes, I've worked with Mr. Carvin.

Q Mr. Carvin who represents the intervenor defendants?

A I have, yes.

Q When did you work with him?

A This was last decade in Arizona in defense of the Arizona commission's work, and Mr. Carvin was an intervenor in that litigation.

Q And who was Mr. Carvin representing, if you recall?

A I believe it was the Republican party.

Q When were you retained as an expert in this case?

A Somewhere abouts the end of November.

Q Of what year?

A Of 2013.

Q How much are you being paid?

A $300 an hour.

Q Is that contingent in any way on the content of your opinion?

A No.

Q How much have you been paid to date in total?

A Roughly $35,000.

Q Sir, have you prepared any reports in this case?

A I have.

Q Let's take a quick look at those. It's Exhibits 26 through 30 if you can take a look at that.

A Yes, these are my reports in this case.

Q How many reports have you prepared?

A I believe five, four.

Q Why so many?

A We've been going back and forth, initially with defendants' first expert witness, Dr. Burnell, and then later with their current expert, Mr. Morgan.

Q Thank you. Let's turn to Virginia itself. Do you have any redistricting experience in Virginia?

A Yes, I do.

Q And can you explain that, please.

A With the help of Christopher Newport University, we conducted jointly a redistricting competition for students during the last round of redistricting, and then that effort was folded into the governor's independent bipartisan advisory redistricting commission.

Q What was the governor's independent bipartisan advisory commission?

A This was a commission that was created by executive order by Governor McDonnell to advise him on redistricting.

Q When was that established?

A Early in 2011. I believe it was January was when the executive order was issued.

Q What was your role with the commission?

A I was a consultant on IT issues and on mapping.

Q So what did the commission ultimately do? Did it generate some maps?

A It did.

Q And did you work on any part of the commission's work in particular?

A I was primarily responsible for drawing House of Delegates districts for the commission, and I oversaw the, a team of William and Mary Law School students who had won the student competition and aided the commission in drawing congressional redistricting plans.

Q Can you describe the conditions under which the commission was working?

A The executive order provided no funding for the commission, and it had to operate in a very tight time frame before the legislative session on redistricting began.

Q No funding?

A No funding.

Q So you relied exclusively on volunteers?

A Volunteers and donors, primarily Republican donors.

Q Did you have any involvement with the congressional redistricting plans produced by the commission?

A Say that again for me, please.

Q Did you have any involvement with the congressional redistricting plan?

A I oversaw the work of the William and Mary Law School students.

Q Did any of the proposed congressional plans suggest increasing the black voting-age population of CD 3?

A They did.

Q Did you, as part of your work with the commission, analyze whether any of the proposed plans would have violated the equal protection clause?

A I did not.

Q Why not?

A We had insufficient time and resources to conduct any such analyses.

Q Did you do any racial bloc voting analyses?

A We did not.

Q Now, a moment ago, Mr. Carvin mentioned a Law Review article you published that's maybe the most attention any Law Review article has ever garnered here. What was that Law Review article about?

A It was a history of redistricting in Virginia from the colonial times to the present.

Q Did it discuss the independent bipartisan advisory commission?

A It did.

Q What was that discussion, briefly?

A It discussed the circumstances around the commission's work.

Q Did your article draw any conclusions about whether race was a predominant purpose behind the enacted plan?

A It did not.

Q Did you even address that?

A We did no such analyses.

Q At the end of the day, did you receive any awards or commendations for your work with the Virginia redistricting independent bipartisan commission?

A The Senate gave a commendation to us for the work on the competition, and the software that we developed has received numerous awards.

Q All right. Let's turn to your work specifically with respect to this case. What materials did you review in order to form your expert opinions and prepare your reports in this matter?

A I reviewed the census data, the Section 5 submission from the Commonwealth of Virginia to the Department of Justice, the Virginia State Board of Elections' election data, hearings and transcripts from the legislative record, and hearings that the legislature held in public comments.

Q Did you review any of the Department of Justice redistricting guidance?

A Generally, yes.

Q And did you review any applicable or historical case law concerning Virginia's redistricting efforts?

A I did.

Q What was that?

A Specifically I looked at a case, *Moon v. Meadows*, that found a district that was pre-cleared by the Department of Justice in the 1990s to be an unconstitutional gerrymander.

Q Thank you. Dr. McDonald, do you feel you had an opportunity to review the materials, all the materials necessary to reach the conclusions that you provided in your report?

A Yes, I do.

Q So let's discuss some of the factual background for Virginia's 2012 congressional redistricting. Why did Virginia have to redraw its districts?

A After a new census, we discovered that the districts had become out of balance in terms of population. At that stage, the districts must be balanced, and redistricting commences.

Q When did the federal census data for Virginia, for the Commonwealth become available?

A If I recall correctly, this was February of 2011, and then we had a revision because of a misallocation of the Norfolk naval base.

Q Who ultimately drew the Virginia congressional redistricting plan based on your research?

A In the public record, Delegate Janis is the one who is identified as the author of the redistricting plan.

Q Sounds like the independent bipartisan commission also proposed a plan?

A They did.

Q And then some students at William and Mary?

A Those were the individuals who drew that plan. There was actually three plans.

Q But the enacted plan was prepared by who?

A Delegate Janis.

Q Thank you. How do you know that Delegate Janis drew that plan?

A Because he said so.

Q Take a look at Plaintiffs' Exhibit 43, if you would.

A Yes.

Q Can you identify that document?

A This is a transcript of the second reading of House Bill 5004 which is the congressional redistricting plan that was eventually enacted.

Q Is the transcript of a hearing before what body?

A The House of Delegates.

Q Did you review this transcript as part of your research in developing your opinions in this case?

A I did.

Q Why?

A Because this is where Delegate Janis explains his role in the redistricting and the criteria which he used in developing the redistricting plan.

Q While we're here, if you can flip back one exhibit to Exhibit 42. What is that?

A This is a videotape of that same transcript.

Q So 42 is the video, 43 is the transcript, they are both of the same hearing?

A Yes.

Q So then let's take a look at page 14 of Exhibit 43, if we might, and we've put it up on the ELMO. Is this the passage where Delegate Janis says that he was the author of the map?

A Which line do you want me to read?

Q If you could look at line 16, page 14, line 16.

A So Mr. Armstrong, who is questioning Janis, asks the question, "Can the gentlemen identify who he was referring to when he used the pronoun 'we'"?

Delegate Janis in response, "What I will say is this is my legislation. I looked at this legislation. I looked at the data. We looked at the recommendations of the congressional district. We tried to reconcile sometimes-competing recommendations from various congressional members. We looked at the data from the census bureau."

JUDGE PAYNE: Slow down a little bit.

THE WITNESS: My apologies. "I was most especially focused on making sure the Third Congressional District did not retrogress in its minority voting influence."

Q I'd like to stop for just a minute and focus on that sentence in the middle on line 21. "We tried to reconcile sometimes-competing recommendations from various congressional members." Do you see that?

A I do.

Q Is that consistent with what Mr. Carvin mentioned a minute ago in opening statement, that he allowed—Delegate Janis somehow allowed the congressional members to draw their own districts?

A No.

Q Why not?

A This is—he's drawing the map, and he's taking into account recommendations from those members of Congress.

He's not allowing them to draw their own districts.

Q Okay, thank you, sir.

JUDGE PAYNE: What page are you talking about?

MR. HAMILTON: This is Exhibit 43, page 14, and specifically that sentence—

JUDGE PAYNE: I got it.

MR. HAMILTON: Thank you, Your Honor.

Q Now, sir, and we don't have this for the ELMO, but if we could turn to page 21 of the same exhibit, tell me when you are there.

A Yes, I'm there.

Q If I could direct your attention to line 18.

A Yes.

Q And so would you read the question and the answer, please.

A Line 18?

Q I'm sorry, line eight.

A So again, Mr. Armstrong asks, "Once again, the gentleman referred to the pronoun 'we' in terms of the development of permissive criteria. Can the gentleman identify who 'we' is in the development of the permissive criteria that he just enunciated?"

Delegate Janis's response is, "'We' is me."

Mr. Speaker: "It's the royal 'we.'"

Mr. Janis: "I'll try to use—I'll be the first person singular if that removes any confusion, Mr. Speaker."

Q Okay. Is there any evidence from reviewing this transcript or any of your other research that anyone other than Delegate Janis drew this map?

A No.

Q Let's turn to Plaintiffs' Exhibit 53, if you would, sir. Are you there?

A I'm there.

Q I'll represent to you this is an email we received from a Republican lawyer, Chris Marston, in response to a subpoena plaintiffs issued to him. Do you know who Mr. Marston is?

A He's counsel to the Republican caucus in the House of Delegates.

Q Okay. Can you take a look at this email chain and tell us how it starts down at the bottom.

A You have to read it from backwards forwards. So the bottom of the chain, what we see is the—Cari Anderson, who is the chairman of the Republican party of Hampton, is making a request of delegates locally in the Hampton Roads area, and he's asking—in the second paragraph down, he's asking for—there's a precinct of VTD that's been split. It's called Macon precinct. That's split in the adopted plan, and he's asking that those splits be rectified somehow so that that precinct will no longer be split.

Q What happens to that request?

A It goes to—from Delegate Oder to—sent to Chris Marston, and Delegate Oder is asking Chris Marston, can you help somehow is the question, and then Chris Marston's response is, "Janis is pretty Lone Ranger on this one, but I'll send it to him with a

copy for you indicating if the conference committee does consider any changes to the plan."

Q Lone Ranger, what did you understand that reference to be?

A That he's working alone on the redistricting plan.

Q All right, thank you. Is that consistent with your understanding from your research?

A Yes.

Q Okay. Did Delegate Janis's plan—

MR. CARVIN: I'm sorry, objection. They laid no foundation for what research, if any, Dr. McDonald did into the internal legislative processes of the General Assembly and how he is in any way qualified to offer an opinion on that.

JUDGE PAYNE: Sustained.

Q Based on your review of the transcript and what Mr.—what Delegate Janis said, Delegate Janis, what did Delegate Janis say about who authored the plan?

A That he did.

Q Is there any evidence that you were able to find that anyone else had anything to do with this?

A No.

Q Thank you, sir. All right, let's—did Delegate Janis's plan ultimately get signed into law at some point?

A Later it did, yes.

Q And when was that?

A It was actually in 2012. This legislative floor debate that we just read is from 2011, so between—in the House of Delegates and the Senate came to loggerheads on competing redistricting plans. Once Republicans gained a functional majority in the Senate, then the same bill, exact same bill was introduced in and it was carried by a different sponsor because Delegate Janis was no longer in the House of Delegates, and that bill was then enacted, signed by both chambers and enacted into law.

Q If the Court wanted to hear about additional detail on the procedural history of the bill, where would it look?

A In the Section 5 submission from the Commonwealth of Virginia to the Department of Justice.

Q Okay. Take a look quickly, just to identify it for the record, at Plaintiffs' Exhibit 8, and my question to you is, is that the 2012 Section 5 submission by the Commonwealth of Virginia?

A This is the attachment of that Section 5 submission that discusses the legislative history of the redistricting plan.

Q We won't go through the detail. It's there for the Court if the Court is interested. How many congressional districts were drawn in the enacted plan?

A 11 of them.

Q I'm sorry?

A 11.

Q And one of those was CD 3?

A Yes.

Q Can you describe—we've got a blow-up of the enacted plan next to the alternative plan up here for the Court to review, but could you just describe for the record enacted Congressional District 3?

A Enacted Congressional District 3 has a bizarre shape.

It stretches from Richmond to Norfolk skipping back and forth across the James River.

MR. CARVIN: I apologize for interrupting. Would it be all right if I saw the map he was referring to?

JUDGE PAYNE: Sure. Do you have a smaller version?

MR. HAMILTON: We provided these.

JUDGE PAYNE: Do you want to move?

MR. CARVIN: Either I move or inconvenience the witness anyway to turn or maybe—

JUDGE PAYNE: You can move it back a little bit if you want so everybody, the lawyers can see.

THE CLERK: Would the Court like me to have a seat over here for him?

JUDGE PAYNE: Can you see it from there, Mr. Carvin?

MR. CARVIN: If it's all right, we can stand right here.

JUDGE PAYNE: You can sit right there.

A The district is bizarrely shaped. It stretches from Richmond to Norfolk skipping back and forth across the James River mostly to capture predominantly African-American communities.

Q So to be clear looking at the demonstrative exhibit, the big blowup on the easel, the one on the left is the enacted plan?

A Yes. It's a blowup of the Hampton Roads area.

Q And the one on the right, what is that?

A That's the alternative redistricting plan.

Q Okay. So just looking at the one on the left, which color is CD 3?

A It's yellow.

Q And is that consistent with the alternative map?

A Yes.

Q So yellow. What's in green?

A That's CD 2.

Q So down in the Norfolk area, can you describe what is happening there?

A In Norfolk, we have the Third Congressional District. It wraps around a small—three predominantly white precincts that are not connected to the Second District via bridge or anything else. They are only connected by water. You have to skip across water twice to get to those white communities.

It wraps around and grabs those, and then the Second District is wrapping—the Third District comes up to get a large precinct, Titustown Center, which is part of the naval air station, and then the Second District wraps around that to get to those three precincts that are just to the south of the naval air station.

Q So Norfolk, the city, is in how many different congressional districts?

A Two.

Q And which portions are in CD 3? Can you describe that demographically?

A They are the predominantly African-American portions of Norfolk.

Q And which are in CD 2?

A The predominantly white communities.

Q Okay. Now, directing your attention to Newport News and Hampton, what is happening up there?

A Same scenario that we just discussed. Predominantly black African-American communities in Hampton and Newport News are assigned to the Third Congressional District, and predominantly white communities or white communities are assigned to the Second Congressional District.

Q Does Hampton and Newport News share a common municipal border?

A They do.

Q Okay. And how many—are the two cities split apart by the enacted map?

A They are, yes.

Q When—what is the history of—talk for just a minute about the history of CD 3. You mentioned before *Moon v. Meadows*. Why did you look at that case?

A In *Moon v. Meadows*, the Court laid out a series of criteria that they evaluated in determining whether or not the map that had been adopted in the 1990s was an unconstitutional gerrymander.

Q And what were the factors that the Court was looking at?

A The Court looked at populations that were moved in and out of the adopted then-unconstitutional eventually district. They looked at the locality splits, both the splits like Norfolk or Hampton or independent cities as well. They looked at VTD splits or precinct splits, and they looked at the shape of the district, and they examined also whether or not water was used to bypass racial communities.

Q All right, thank you, sir. Can I direct your attention to Plaintiffs' Exhibit 50.

A Yes.

Q What is this document, sir?

A This is a history of the change of the black voting-age population in the Third Congressional District from 1991 through 2012 using a metric that stated—that the Commonwealth of Virginia included in their Section 5 submissions.

Q Thank you. If I might ask Mr. Neal to toggle over to the laptop so I may display some illustrative exhibits. I'll be displaying a number of exhibits. They've been reviewed to the opposing counsel, and there are no objections either to our Illustrative or to the Illustrative that the defendants intend to use during their presentation.

JUDGE PAYNE: Do we have them?

MR. HAMILTON: I'm sorry?

JUDGE PAYNE: Do we have them?

MR. HAMILTON: They're going to be displayed on the screen in just a moment.

JUDGE PAYNE: They may have better eyes than I do, but I can't see anything.

MR. HAMILTON: I can't either, Your Honor.

JUDGE PAYNE: Do you have a hard copy of each one of the ones you're going to use for each of us?

MR. HAMILTON: I don't, Your Honor, but I will at lunch.

THE CLERK: Do you have the document up, because I don't see it.

MR. HAMILTON: I do. While we worry about that, let's move forward with the examination and hope that we can display this.

Q Let's start—so Exhibit 50, Dr. McDonald, is a display of the population changes in CD 3.

MR. HAMILTON: Your Honor, it's exactly the same thing as Exhibit 50. I reformatted it to make it look a little prettier, so it's what you've got in your hands there.

Q Let's start with 1991. What was the black voting-age population of the Third Congressional District in 1991?

A 61.17 percent.

Q And what happened to that CD?

A That was found unconstitutional.

Q That's the *Moon v. Meadows* district?

A Correct.

Q How does the 2012 enacted Congressional District 3 compare to the congressional district invalidated in *Moon v. Meadows* geographically?

A It's very similar.

Q How so?

A Like that redistricting plan, the Third Congressional District skips along the James River back and forth picking up predominantly African-American communities. Like the third—the unconstitutional Third District, it includes portions of Petersburg as well.

Q And you already indicated that *Moon v. Meadows* found the district unconstitutional. I think you identified the factors the courts looked at. Did you, during the course of your analysis, look at the same factors that the Court had identified in *Moon v. Meadows*?

A I did.

Q Now, what happened after the *Moon v. Meadows* court struck down CD 3?

A A remedial map was drawn and pre-cleared by the Department of Justice.

Q And which—what year was that?

A That's 1998.

Q So if we're looking at this table, either in Exhibit 50 or in the Illustrative exhibit that's up on the screen, that would be the second column there?

A Correct, the 1998 column.

Q And black voting-age population of that district was what?

A 50.47 percent.

Q Now, you mentioned that it was pre-cleared by the Department of Justice?

A That's correct.

Q With that black voting-age population?

A Correct.

Q What cities did the Third Congressional District lose under the remedial plan in 1998?

A It lost Petersburg and Portsmouth.

Q Okay. And where are those cities in today's enacted CD 3?

A They are in today's enacted CD 3.

Q When was Portsmouth added back?

A In 2001.

Q And when was Petersburg added back?

A 2012.

Q 2012. So let's just pause there for a moment. Did I hear you correctly say Petersburg was moved out of the Third Congressional District in 1998?

A Correct.

Q And it was added back just in the enacted plan?

A Correct.

Q So to be clear, was Petersburg in the benchmark Third Congressional District?

A It was not.

Q It was not. You are sure?

A Absolutely sure.

Q Okay. Hold that thought, and we'll come back to it in a minute. What was the black voting-age population—well, you said the black voting-age population in '98 was 50.47. When did the CD next change, the Congressional District 3 change next?

A After the next census in 2000, in 2001.

Q And what was the black voting-age population then?

A This was 53.2 percent as the Commonwealth of Virginia reported to the Department of Justice.

Q Maybe this is a good time to pause and ask, why do you say it like that?

A Well, the Commonwealth of Virginia used a metric which the Department of Justice recommends when first reporting black voting-age population. It's in my reports. It's called the exclusive method because it only counts African-Americans as people who are—have, on the census forms, identified themselves as African-American or African-American and white.

After the 2000 census, the census started allowing people to use multiple racial categories, so it was then feasible to have people of multiple racial categories.

The OMB and the Department of Justice then say if there are racial issues at stake, the appropriate measure to use is what I call the inclusive method which is to look at anyone who identifies themselves as African-American or African-American and any other of the four racial categories, white, Asian, native American, or Asian-Pacific, even multiple categories, so in the OMB and Department of Justice guidelines, that's the correct percentage. These are percentages, that's this inclusive method. The percentages that are reported here are the exclusive method that only look at black and black plus white.

Q Thank you, sir. Okay, so 2001, it was 53.2 percent?

A Yes, using this exclusive method.

Q Was that submitted to the Department of Justice pursuant to Section 5 for preclearance?

A It was.

Q With 53.2 percent?

A Yes.

Q And was it pre-cleared?

A Yes.

Q And then how did that change using the exclusive method for counting in the enacted plan?

A It changed in 2012 to 56.3 percent using this exclusive method.

Q If we use the inclusive method, what is the total black population in 2012?

A 57.2 percent.

Q And you are not able to use—just to be apples to apples, would it be possible to go back to 1991 and calculate the numbers on these tables using the inclusive method?

A It would not, because prior to 2000, the census bureau only allowed people to check off one of the five races.

Q If the Court wanted to confirm the numbers you just testified to, where would you find those in the exhibits before the Court?

A They are found in my expert reports.

Q In addition, would they be contained in the Section 5 submissions ?

A These specific numbers are located in the Section 5 submissions, yes.

MR. HAMILTON: And, Your Honors, I won't take the time to go through the notebook and identify each one. The 1991 Section 5 submission is Plaintiffs' Exhibit 23. The 1998 Section 5 submission is Exhibit 21, and the 2001 Section 5 submission is Exhibit 19. And I'm happy to go through them in detail if the Court would like, but I think with the reference in the record, I'll move ahead.

Q Now, let's discuss, if we could, the conclusions that you can draw from looking at Plaintiffs' Exhibit 50.

A The district that has 51.17 percent black voting-age population would be suspect, because it had been found unconstitutional by the *Moon v. Meadows* court that the Department of Justice will preclear a plan as low as 50.47 percent black voting-age population.

Q What's happened over time to CD 3?

A It's incrementally increased its black voting-age population.

Q Is it closer now to the *Moon v. Meadows* district, or is it closer to the remedial district drawn in 1998?

A It's closer now to the *Moon v. Meadows* district than the remedial district.

Q Let's discuss the political performance of the Third Congressional District since 2001. Who is the current incumbent in that district?

A Representative Bobby Scott.

Q When was he first elected to the United States House of Representatives?

A 1992.

Q If you turn back to Plaintiffs' Exhibit 27, I think that's your initial report.

A Yes.

Q And specifically, if you could turn to page 11?

A Yes.

Q Can you describe the table that's found in the middle of the page, and I'm displaying it on the overheard.

A This is the vote share that Bobby Scott received and his opponents from 2002 through 2012.

Q Can you explain the numbers in 2002, 2006, and 2008? Those are very high numbers. Why is that?

A He's running unopposed by a major party Republican opponent.

Q And he won with what percentage of the vote?

A He's winning over 95 percent of the vote.

Q In those three elections?

A In those three elections.

Q What about the other two, in 2010 and 2012, did he have an opponent?

A Yeah. The Republicans choose to run a candidate against him. In those elections—in 2010, he receives 70 percent of the vote. In 2012, he receives 81.3 percent of the vote.

Q Was the 2010 election conducted under the enacted plan?

A It was not.

Q What plan was in place in 2010?

A That was the benchmark plan.

Q And he won by 70 percent of the vote?

A In a Republican waive year of historic proportions, he won with 70 percent of the vote.

Q Anyone else in Virginia have a winning margin of 70 percent or better?

A I'd have to look at the State Board of Elections. I believe in 2010, someone did.

Q Anyone else in Virginia in the—

A In Virginia, yes.

Q —in the congressional delegation have a winning percent—

A I believe Goodlatte did.

Q In your professional opinion, was Representative Scott at risk of losing reelection in any of the elections listed on this table in Exhibit 27?

A No, he was not.

Q And what plan was in place for the 2012 election?

A The adopted plan.

Q And how did he do in that election?

A He received 81.3 percent of the vote.

Q Is Representative Scott the black population's congressional candidate of choice in CD 3?

A Presumably so, because they're the majority of the population of the district, and he's receiving 70 percent of the vote.

Q Let's turn for a minute to the results of the 2010 census and some of the legal requirements for redistricting.

JUDGE PAYNE: Excuse me. Before you go away from this page 11, do you have anywhere in your report the percentage of the voters that were African-American and the percentage that were not?

THE WITNESS: Yes.

JUDGE PAYNE: Where is that in your report?

THE WITNESS: Those were those tables that we were just looking at, and they are found in my report. They would be—JUDGE PAYNE: I mean of the people who actually voted.

THE WITNESS: Oh, the people who actually voted.

JUDGE PAYNE: The people who actually voted in the election. Do you have any record in here of what percentage of the people who actually voted were African-American and what percentage were not?

THE WITNESS: Right. To do—to answer your question, what experts—

JUDGE PAYNE: Yes or no? Start with that.

THE WITNESS: Not specifically of Bobby Scott, but I have looked at some other candidates.

JUDGE PAYNE: I'm talking about in the Third District, do you have that? Do you have that figure for the Third District in this report?

THE WITNESS: Not for Bobby Scott, no.

JUDGE PAYNE: All right, thank you.

JUDGE DUNCAN: Excuse me. Could I ask one other thing? You said that you extrapolated from the

data that the Department of Justice will preclear a plan as low as 50, and I didn't get—

THE WITNESS: .47.

JUDGE DUNCAN: And for that, your authority in the record is?

THE WITNESS: The district that was pre-cleared as a remedial district to the *Moon v. Meadows* decision.

JUDGE DUNCAN: Thank you.

THE WITNESS: You are welcome.

Q Let's just follow up on that. In your experience, are you familiar with Department of Justice preclearance?

A Yes, I am.

Q Has the department pre-cleared plans below 50 percent?

A They have.

Q Have they done that frequently?

A If the evidence provides support that an African-American or minority candidate of choice can be elected out of a district, they will do that. The frequently question is, how frequently are there districts of that magnitude, and there aren't many, but there are some that exist out there.

Q Thank you, sir. And then just to follow up on Judge Payne's question, why don't you have the breakdown, the racial breakdown of the actual voters in CD 3? Is that data available?

A We do not have the race of voters in the State of Virginia.

Q It's not reported?

A It's not reported.

Q So if you wanted to collect the data, you wouldn't be able to.

A We would have to infer it through statistical analyses, but we cannot directly collect this information.

Q Thank you, sir. All right, so let's go back to the 2010 census and some legal requirements, and we were going to have you turn to page 14—Exhibit 27, page 14, and if you could, describe the table that appears at the top of the page.

A This is statistics for the—population statistics for the benchmark and the adopted districts.

Q What do you mean with the term benchmark?

A It's a term of art that's used in this sort of litigation. It refers to the districts that were in place prior to the last redistricting.

Q And as used on this table, the phrase adopted means the enacted plan?

A Correct.

Q What does the first column show?

A The first column shows the total population of those districts.

Q Under both plans, the adopted and the benchmark?

A Correct.

Q What does the next column show?

A This is what's called the ideal population. In order for the districts to have exacting equal

population across the Commonwealth of Virginia, this is the population number that you would have to have in order to achieve that goal.

Q So how many people needed to be added to the Third Congressional District to reach the ideal or required population?

A Right. So this is the third column labeled deviation. The benchmark district was under the ideal population by 63,976.

Q Okay. And then what's down at the bottom, the bottom line of this table? Could you explain what that means?

A The bottom line of this table. This is—there's a row that is the change of the district from the benchmark to the adopted and then the percent net black voting-age population that was added to the benchmark district.

Q So do I understand this to say that using the inclusive method, this is the one, two, three, four, five, sixth, seventh column over, counted that way, 92 percent of the net movement was black voting-age population?

A Well, it's the sixth after the heading, so if you look under the heading that's black VAP (inclusive method), yes, 92 percent net of the population that was moved into the adopted district from the benchmark district was African-American. The black voting-age population was African-American.

Q Okay. Thank you. Other than the constitutional equal population requirement, we've heard some talk in the opening statements about the

Voting Rights Act. Does the Voting Rights Act apply to Virginia and its redistricting decisions?

A It does.

Q Which sections?

A Section 2 and Section 5.

Q What is Section 2 as far as you understand it?

A Section 2 covers the entire country, and it requires, in certain circumstances, a majority-minority district be drawn.

Q And what is Section 5 as far as you understand it?

A Section 5 refers to nonretrogression, so it—only certain jurisdictions are required under Section 5 to demonstrate that a new redistricting plan shall not retrogress the abilities of a minority community to elect a candidate of their choice.

Q If I could direct your attention to Defendants' Exhibit 9, it should be the smallest black notebook on the edge there.

JUDGE PAYNE: Defendants' or the intervenor defendants?

MR. HAMILTON: Defendants', Your Honor.

THE WITNESS: I would add, as I'm looking to this, Section 5 is no longer operative in the State of Virginia as of last year.

JUDGE PAYNE: Which exhibit do you want, Defendants' Exhibit what?

MR. HAMILTON: Number nine.

JUDGE PAYNE: All right.

THE WITNESS: Yes.

Q Dr. McDonald, can you identify Defendants' Exhibit 9?

A This is the federal register, and it is a notice that has been written by the Department of Justice. It's Entitled Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act.

Q What is your understanding of the purpose of this guidance?

A This was guidance that was produced in February 2011 prior to the redistricting, and it was intended to give jurisdictions across the country guidance on how to adhere to Section 5 of the Voting Rights Act.

Q If I can direct your attention to the second page of the exhibit, it's numbered 7471, and the heading is Analysis of Plans. Can you read that first paragraph into the record, please.

A "As noted above, there are two necessary components to the analysis of whether a proposed redistricting plan meets the Section 5 standard. The first is a determination that the jurisdiction has met its burden of establishing that the plan was adopted free of any discriminatory purpose. The second is a determination that the jurisdiction has met its burden of establishing that the proposed plan will not have a retrogressive effect."

Q Is there a section of this guidance that describes retrogressive effect?

A There is.

Q Where is that?

A It's on that same page. It's in the second column towards the bottom. There is a subheading entitled Retrogressive Effect.

Q Can you read the—let me direct your attention to the first paragraph in the third column. Maybe you can summarize for us rather than read the whole thing into the record. What is it saying here?

A Well, the first sentence is pretty descriptive. It says, "A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minorities' effective exercise of the electoral franchise."

Q Is that consistent with your understanding of the Section 5 standard?

A Yes.

Q Okay. And let's look at the next paragraph. If you could read that paragraph, please. It begins with "In determining"?

A Yes. "In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment.

"Rather, in the department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." Do you want me to continue reading?

Q Please do, to the end of the paragraph.

A "As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances

such as differing rates of electoral participation within discrete proportions of a population may impact on the ability of voters to elect candidates of choice even if the overall demographic data show no significant change."

Q Thank you. Is that consistent with your understanding of the way that the Department of Justice reviews Section 5 submissions?

A Yes. They look at electoral performance. They don't look strictly at the census black voting-age population.

Q And is that what is sometimes referred to as a racial bloc voting analysis?

A It is.

JUDGE PAYNE: These are analyses performed by the Department of Justice? Is that what you are saying?

THE WITNESS: Usually what happens is that jurisdictions will do—

JUDGE PAYNE: On that particular question, I was just asking whether the Department of Justice is making the analysis.

THE WITNESS: They may do their own analysis, or the jurisdiction may do their own analysis.

Q In your experience, is it recommended that the jurisdiction does its analysis, racial bloc voting analysis?

MR. CARVIN: Objection. There's no foundation that he knows—

JUDGE PAYNE: Sustained. You can ask him that question if you want to, but there's no foundation yet.

MR. HAMILTON: Thank you. Let me try.

Q Have you reviewed Section 5 submissions by various jurisdictions to the Department of Justice for preclearance?

A I have.

Q Do some of them contain racial bloc voting analyses?

A I have. I've assisted with the development—

JUDGE PAYNE: Excuse me. The question was, Doctor, if you listen to the question, was some of the ones you reviewed, did they have those analyses done by the jurisdiction.

THE WITNESS: Yes. One of the jurisdictions that I reviewed, I actually participated in the development of those statistics.

JUDGE PAYNE: So of the ones that you've reviewed, did all of them have it, or are you saying that just one had it?

THE WITNESS: Not all of them have them, no.

JUDGE PAYNE: The only one you knew about is one, or do you know of more?

THE WITNESS: I know of more.

JUDGE PAYNE: I think that's what he's trying to ask.

MR. HAMILTON: Thank you, Judge Payne. I appreciate the assistance.

JUDGE PAYNE: Please listen to the question and answer the question. They know what they want to try to get out, and it will go faster if they do that.

Q So, Dr. McDonald, if I understand you correctly, you reviewed a number of Section 5 submissions; is that true?

A Yes.

Q You participated in at least one?

A Yes.

Q Have you participated in more than one?

A No, I have not.

Q And putting aside the one that you participated in, some of the ones that you reviewed, did they contain racial bloc voting analyses?

A Yes, they did.

Q And then the one that you prepared, did you prepare a racial bloc voting analysis?

A I assisted on one for the Arizona commission.

Q Thank you. You answered my next question which was, where. Okay, thanks so much. As far as you know, does the Section 5 analysis require the Department of Justice or the United States District Court for the District of Columbia to determine whether race was the predominant purpose behind a redistricting decision?

A It does not.

Q Why not?

A The only criteria in terms of the ability to elect—

MR. CARVIN: I'm sorry. We switched from Justice Department practice to a lay witness's, nonlawyer's views on Section 5. This is not proper testimony on a legal issue.

JUDGE PAYNE: Is that testimony in the report?

MR. CARVIN: No, it's not, Your Honor.

JUDGE PAYNE: Sustained.

Q Okay. Well, let's turn to page 7470 of Defendants' Exhibit if we could. Tell me when you are there.

A Yes.

JUDGE PAYNE: Exhibit 9.

MR. HAMILTON: Yes, same exhibit, Your Honor.

Q The first full paragraph in the third column begins "The Attorney General may not."

A Yes.

Q Could you read that paragraph, please.

A "The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person-one-vote principle, on the grounds that it violates *Shaw v. Reno*, or on the grounds that it violates Section 2 of the Voting Rights Act. The same standard applies to a declaratory judgment action. Therefore. jurisdictions should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to the plan under other statutes by the Department of Justice or private plaintiffs."

Q So does preclearance by the Department of Justice foreclose the possibility that race was a predominant purpose behind a plan, in your mind?

A It does not. It did not in the *Moon v. Meadows* instance as well.

Q Was the CD 3 in *Moon v. Meadows* pre-cleared by the Department of Justice?

A It was.

Q And nonetheless, the *Moon v. Meadows* court found that it was racial gerrymander; is that correct?

MR. CARVIN: Objection, leading.

JUDGE PAYNE: As Judge Merhige said, that went out with the Coolidge administration, Mr. Carvin, but by the same token, you are getting into a lot of things that are fairly obvious. Just the mere fact that we're here today answers most of those.

MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: Let's get on to the meat of what you are doing, if you would, please.

MR. HAMILTON: All right, thank you.

Q Were there any public statements in the legislative record that you reviewed that show that Virginia's lawmakers were aware of the Voting Rights Act when drawing the Virginia congressional district?

A Yes.

Q Where was that? Who said that?

A Delegate Janis.

MR. CARVIN: I object to this entire line of inquiry. He has filed four expert reports. He has never once referred to Delegate Janis's statements on the Voting Rights Act or politics or anything else.

MR. HAMILTON: Your Honor, it's in Exhibit 43 which is in the record, and the witness—

JUDGE PAYNE: The objection is that it wasn't within the disclosures required by Rule 26, and the proof of that is either it's in there or it's not. What are you pointing me to?

MR. HAMILTON: Well, I'm not pointing you to one of his reports, Your Honor.

JUDGE PAYNE: His objection is he can't testify to this because he didn't have it in his report under Rule 26. It's not, therefore, an appropriate disclosure, and he's beyond the scope of what he was authorized to testify about. Where in his report is this testimony on this topic, I think, is the objection; is that right, Mr. Carvin?

MR. CARVIN: That's correct, Your Honor.

JUDGE PAYNE: I think that point needs to be proved by you in order for him to testify about it. He can't just add as he goes along. That's the whole purpose of the Rule 26 disclosures, is that he stay within the bounds of what he did in his report so that the other side will have an opportunity to address those reports and to cross-examine and they'll know where we are heading. Where in his report does he testify to it?

MR. HAMILTON: Your Honor, he doesn't testify to this specific statement. The evidence is in the record in Exhibit 43, and the witness has testified this was the foundation of the opinion that was disclosed and was contained in the report.

JUDGE PAYNE: Objection sustained.

MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: He can't testify about it if he didn't comment on it in his report. It's not good enough that it was in something that he read.

MR. HAMILTON: Okay.

Q Dr. McDonald, do you know whether Delegate Janis focused on the racial population data in the consideration of the plan?

MR. CARVIN: Same objection. The word Delegate Janis doesn't appear in any of his four reports.

JUDGE PAYNE: Maybe this is a good time for you to sort through what was in his report and what's not so we can get going and be confined. It's not so rigid as to require anything—as to limit to anything—unless he actually said it, but it's got to be fairly encompassed within the scope of the report or it doesn't fit the rule and it is not within—it doesn't give them adequate notice. And we'll change court reporters at this time, take a 20-minute recess and be back.

MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: 20 minutes from—I can't even see that clock, but you can use that clock.

(Recess taken.)

JUDGE PAYNE: All right. This is just a reminder. I think if you need to point us to something, we can read, and let's get down to the meat of what it is that he's going to testify about, if you would, please, Mr. Hamilton.

MR. HAMILTON: I will indeed, sir.

BY MR. HAMILTON:

Q Dr. McDonald, I'd like to turn to your opinions about enacted CD 3.

At the conclusion of your research and analysis were you able to reach a conclusion with respect to whether race played a role in the drawing of Enacted Plan's Third Congressional District?

A I was.

Q What was that opinion?

A It's found in my first expert report, that's Exhibit 27 for the plaintiffs.

Q Instead of telling us where it's found, why don't you just tell us what the opinion was.

A That race was a predominant factor in the creation of the plan.

Q Before you explain how you reached that conclusion, let me ask you this: Didn't the General Assembly have to consider race? Isn't that required by the Voting Rights Act?

A Yes, they did consider race.

Q What's wrong with race being a predominant factor in redistricting?

A Traditional redistricting principles were subsumed to race.

Q Let's talk about how you got to your principled conclusion. What factors did you examine to reach your conclusion that race was a predominant factor in drawing CD 3?

A I examined the compactness of the districts. I examined how the districts had split locality boundaries, precinct or VTD boundaries. I examined the overall shape of the district, and I examined the way in which the district used water to bypass racial communities.

These were all factors that the *Moon* Court examined. And one additional one was the movement of racial populations in and out of the Third Congressional District.

Q You've mentioned traditional redistricting criteria a couple of times. What are they?

A Those are similar to what I just outlined. That list.

Q Let's take compactness first. This is discussed on your expert report?

A Yes.

Q Page 7?

JUDGE PAYNE: Just ask him to testify what his conclusion was on compactness that led him to his conclusion. You don't have to have him read the report.

MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: And if somebody wants him to read it, he'll get into that.

Q What were your conclusions with respect to compactness, sir?

A That the Third Congressional District is the least compact district of any district in the Commonwealth of Virginia.

Q What tests did you use to measure compactness?

A Well, one, I just looked at it visually, which is what courts typically do when they examine these sorts of claims and compactness claims.

In addition, there are some statistical procedures we can use, measures that we can develop to measure the degree of compactness of districts.

Q What are those called?

A The three that the Commonwealth of Virginia provided in their Section 5 submission and what I used were ones called Reock, Polsby-Popper and Schwartzberg.

Q Are those measures summarized in a table in your report on page 7?

A They are.

Q And I have that up on the screen. And as measured by those various tests, do the tests come out all the same?

A Yes. In the Reock and the Polsby-Popper, a lower value means that the district is less compact. The Schwartzberg is the other way around. A higher value means that the district is less compact. On all three measures the Third District is the least compact district.

Q Thank you, sir.

So let's talk about the next redistricting criteria: Contiguity. First of all, what is contiguity?

A Contiguity means that all portions of a district are connected to one another.

Q Is the enacted CD 3, according to your analysis, contiguous?

A It is contiguous.

Q Is it contiguous by land?

A It is not.

Q What do you mean by that?

A It's connected at points, and this is in the maps that you see in front of you in the left-hand screen, vividly illustrated that the James River and

tributaries are used to connect various portions of the Third Congressional District.

Q Were you able to form a conclusion as to why that happened, what was going on with connecting the districts by the James—the portions of the districts by the James River?

A When we looked at the portion of the Third Congressional District that's assigned to Newport News and the portion that's assigned to Hampton. the intervening geography, the land that's between those two districts is predominantly white communities.

So what's being done here is that the James River is being used to bypass those white communities to connect the two predominantly African-American communities in Newport News and Hampton.

When we look down into Norfolk, what we also see is that water is being used twice. Once across tributary Willoughby Bay, and a second time through something called the Lafayette River, without a connecting bridge, by the way, to bypass an African-American community to place a white community that's in that little pocket within the Second District that the Third District wraps around.

Q Did you form a conclusion as to whether this traditional redistricting criteria had been respected or subordinated to other considerations?

A I did.

Q What's that conclusion?

A That race had been subordinated. I mean that traditional redistricting principles had been subordinated to race.

Q Let's turn to the last redistricting criteria that you mention, and that's respecting local political boundaries. What are the local sort of political boundaries that we're talking about?

A We're talking about counties and independent cities in Virginia.

Q What conclusion did you reach with respect to

—with respect for local political boundaries?

A That the Third Congressional District split more locality boundaries than any other district in the Commonwealth of Virginia.

Q And you summarized your conclusion in a table?

A Yes.

Q Where is that table?

A This is on page 9.

Q How does the number of localities split compare in between all of the congressional districts in the Enacted Plan?

A I'm not sure I understand that question.

Q Looking at your table—

A Yes.

Q You *have* it there in front of you. Which one has the highest split?

A The third.

Q Okay. What's the next highest?

A The first.

Q How many splits does the first have?

A Five.

Q How many does the third have?

A Nine.

Q Okay. Did the Congressional District Three contribute to some of the splits in CD 1?

A Yes. If a district splits a locality, it must share a locality with one or more districts. And so two of the splits that are involved with District 1 actually also involved District 3 as well. They share a boundary.

Q So having compiled this data and looked at it, what conclusion did you reach with respect to the locality splits?

A That, again, that traditional redistricting principles *have* been subordinated to race.

Q Did you analyze any other local political subdivisions?

A Yes, I also examined VTD splits.

Q VTD, what does that stand for?

A It's a Census Bureau term. It refers to voting tabulation district, but we might commonly think of them as precincts.

Q So you also analyzed VTD splits. Is that summarized in a table in your report as well?

A I do, yes.

Q Where would we find that?

A It's on page 10.

Q How many VTDs are split by the entire Enacted Plan?

A I'd have to do that math.

Q Let me ask you this way: Which congressional district splits the most VTDs?

A The Third Congressional District.

Q How many VTDs are split?

A Fourteen.

Q What's the next highest one?

A The Fourth Congressional District.

Q How many VTD splits does the Fourth have?

A Seven.

Q Does the Congressional District 3 contribute to any of the VTD splits in Four?

A All of them.

Q Now, *have* you heard the term "technical splits of VTDs" before?

A Yes.

Q What does that mean?

A It comes up in Mr. Morgan's report, for example, and he believes or he states in his report that if a split of a voting tabulation district does not involve population, for example if it involves water, then it doesn't actually count as a split. It's only technically split.

Q How does that—how is that factored in here? Did you consider whether some of these VTD splits in 14—VTD splits in CD 3 were merely technical splits?

A I did not.

Q Mr. Morgan has testified they are irrelevant because they don't affect any population. Do you agree with that?

A I do not.

Q Why not?

A Because these are VTDs—they may not be visible in the top chart, but they are a little bit more visible in that bottom chart that's on the floor.

These are VTDs that are, for example, in Newport News that are in that area that's associated with the Second Congressional District, as an example, and they extend out to the county boundary with, say, the Isle of Wight. So that water is assigned to a VTD, and the Third Congressional District is using the water there, the James River, to bypass those white communities.

It has to assign some geography, so it's assigning this zero population water geography to bypass those white communities in Hampton and Newport News in order to connect the predominantly African-American communities in Newport News and Hampton together.

You wouldn't have to do these splits if you weren't trying to bypass those communities using water.

Q What conclusion did you draw from having looked at where these VTD splits occurred and the number or frequency of VTD splits?

A That race had been—that traditional redistricting principles had been subordinated to race.

Q So let's talk about how CD 3 changed in the Enacted Plan. You mentioned before it was underpopulated. Did the General Assembly simply add people from other districts until it reached the ideal number?

A It did not.

Q What did it do?

A It removed some population from the Third District and added—which made it even more difficult to balance that population. It also would be a violation of the district cores because population within the current Third District had been removed from that district. And then to compensate the district that the population had been moved out of the district, even more population needed to be moved back into the district.

Q Did you reach a conclusion as to why population was removed from CD 3 before population was added back in?

A I did.

Q What's your conclusion, sir?

A That traditional redistricting principles had been subordinated to race.

Q Let's look at Exhibit 27, page 15.

JUDGE PAYNE: Excuse me. The composition of the group that was moved out, what was your testimony as to what was the composition of that group?

THE WITNESS: The population that had been moved out of the Third Congressional District?

JUDGE PAYNE: Yes.

THE WITNESS: It was predominately white.

JUDGE PAYNE: What about the population that was moved in?

THE WITNESS: It was predominantly African-American.

MR. HAMILTON: Thank you, Your Honor. I was going to actually ask a few more question on that exact topic to try to flesh that out a little bit.

Q If you could turn to page 15 of your report, which is Exhibit 27. Is there a table there that summarizes your analysis of these population movements?

A Yes.

Q I've displayed it up on the screen as well.

Can you describe this chart that we're looking at? It's table 6 on page 15 of Exhibit 27 in your report.

A So the columns in the first column we're looking at is a definition of what population we're talking about. This is population that, for example, was moved from the first to the third, third to the first, second to the third, and third to the second, and so on.

Q So that we understand this chart, let's just look at the first line, and it's entitled, or the first column is entitled, "Benchmark to Adopted District."

And below there there's like a one with an arrow pointing to a three. Do I understand that correctly that that line is going to discuss the population that moved from CD 1 to CD 3?

A Yeah, for example—or two to CD 3 as well.

Q But that first line is one to three, correct?

A Correct.

Q And the second line would be three to one; is that correct?

A Correct.

Q Thank you, sir.

Okay. So let's look at the swaps between CD 3 and CD 2. That would be the third and fourth line of data on this chart; is that right?

A Right.

Q How many voting-age residents were moved from CD 3 to CD 2?

A So this would be on the fourth line down, three to two. Total population that was involved was 25,501, and of that, the voting-age population was 20,049.

Q How many voting-age residents were moved from CD 2 to CD 3?

A Again, 27,917 is the total population. Voting age is 20,543.

Q So now to get to the question the Court asked you a moment ago, what was the percentage of black voting-age residents moved out of CD 3?

A Out of CD 3 and into CD 2, the number was—

Q No. I'm not asking the number, sir. I'm asking the percentage.

A The percentage using the inclusive method would be 18.8 percent black voting-age population.

Q That's the number of black voting-age residents moved out, 18.8 percent, is that correct?

A Correct.

Q What's the percentage of black voting-age residents moved in to CD 3?

A 37.9 percent.

Q Say that again.

A 37.9 percent.

Q Almost double?

A Yes.

JUDGE PAYNE: That's a different method. It's 36.7 percent if you use the exclusive method. If you compare apples and apples. Your first comparison was the exclusive method. When you first answered 18.3 percent, I thought you were talking about the exclusive method. And when you answered about the 37.9 percent, that's the inclusive method.

THE WITNESS: If I did, I apologize. I misspoke. I meant to use the 18.8 percent for the inclusive method.

JUDGE PAYNE: Maybe I just misheard you.

Q So either way, the data is on the chart, however way the Court wants to consider it. The far right column, we would look at the third and fourth line to get the inclusive method; is that right, sir?

A The far right column is the inclusive method, yes.

Q The next column over, the second to the right of the far right column is what method?

A The exclusive method.

Q So we can look at the data either way. Does it make a material difference either way?

A Not a large difference.

Q Thank you, sir.

A But it does make somewhat of a difference.

Q Now, where on the map did these swaps occur?

A Between the second and the third. This would be population predominantly that's on—if you look at

that hook that's in Norfolk, that pocket of green that was in the Second Congressional District formerly was in the Third Congressional District. So that's predominantly white areas that were in the Third Congressional District. In the benchmark Third Congressional District.

Q Okay. Is it also in Newport News and Hampton or is that some other set of—

A There's a precinct as well in Hampton that was moved out of the Third Congressional District as well.

Q How about Newport News?

A No.

Q All right. Thank you, sir.

A Not between the second and third.

Q Let's examine just one more set of these swaps. Let's look at the swaps between three and four. How many voting-age residents were moved from benchmark CD 3 to benchmark CD 4?

A 4,176.

Q How about the other way around. How many voting-age residents were moved from four to three?

A 27,835.

Q So, again, the question that the Court asked a moment ago, of the voting-age population moved out of CD 3 and into CD 4, what percentage of them were black voting-age residents?

A 42.1 percent.

Q Now, the other question, how about those moved out? What's the black voting-age population?

A 75.8 percent.

Q So, again, after analyzing these population swaps, did you reach a conclusion with respect to whether race played a role in the redistricting?

A Looking across all of the swaps that were made between the third and the surrounding districts, I came to the conclusion that traditional redistricting principles had been subordinated to race.

Q You testified earlier that at the conclusion of—after reviewing the Census data, CD 3 was underpopulated how much?

A Roughly, 63,976. Not even roughly.

Q How many people in order to achieve—in order to add 63,976 people to CD 3, how many people were moved in and out of CD 3 to achieve that correction?

A Roughly, if we tally up all these numbers, it's roughly 180,000 people.

Q 180,000?

A Correct.

Q Have you examined the political performance of the VTDs included in or left out of the enacted CD 3?

A I have.

Q Why did you look at that?

A To examine whether or not political considerations may be an explanation for the changes to the Third Congressional District.

Q Did you reach a conclusion as a result of that investigation?

A Yes, I did.

Q What was your conclusion?

A I concluded that race had trumped politics.

Q Let's walk through your analysis here to see how you got to that conclusion. What did you look at?

A I examined the election results within the VTDs and the racial character of the black voting-age population of the VTDs.

Q Did you also look at whether they were included or excluded from CD 3?

A Yes.

Q How did you decide which VTDs were in localities adjacent to the enacted Third Congressional District?

A Any localities where the Third Congressional District either split or—those would be one definition. The other would be any locality that would be adjacent to the Third Congressional District.

Q Okay. Could these VTDs have been added in or out of CD 3 without substantially affecting the compactness of the district?

A It really depends on how you wanted to go about doing the drawing, but in some cases, yes. In fact, you could improve the compactness.

Q How did you—let's talk the other factor. How did you figure out what was strongly Democratic VTD?

A I looked at those VTDs where there was a Democratic performance. It was an average of five statewide elections, it's in my report, and that average above 55 percent.

Q So you looked at the population of VTDs with average Democratic performance of 55 percent or greater?

A Correct.

Q As a result of that conclusion, that analysis, your conclusion was?

A That among the pool of available VTDs that could have been placed within the Third Congressional District that were highly Democratic performing, those that had higher black voting-age population were placed within the Third Congressional District.

Q What happened to the strongly Democratic VTDs with largely white population.

A They were left out of the Third Congressional District.

Q Where were they put?

A In some cases, for example, they were put into the Second Congressional District.

Q Okay. All right. Let's look at Plaintiffs' Exhibit 28, if we could. And while we're getting there, Mr. Neal, if we could switch over to the ELMO, that would be helpful. Are you there, sir?

A Plaintiff's 28, yes.

Q What is this?

A This is a report that I wrote in reply to defendant's first expert witness, Dr. Brunell.

Q On page 7 and 8 of your report, this is where you discuss the VTD analysis you just testified to; is that right?

A Yes, it's a section that's entitled, "Race or Politics."

Q I'd like to have you turn to Intervenor-Defendants' Exhibit 50.

JUDGE PAYNE: Is he using the corrected one now? They corrected this this morning by substituting one in. Is he testifying about the corrected one?

MR. HAMILTON: He's not. He's testifying about the original one, and then we'll get to the corrected one, Your Honor. There's a story here.

Q Do you have it there in front of you, sir?

A Yes, I do.

Q Was this document provided to you as part of Dr. Brunell's report?

A It was not.

Q Was it included in Mr. Morgan's report?

A It was not.

Q When did you first see it?

A I saw it roughly a week or so after Mr. Morgan's deposition. So early May.

Q That was after your deposition?

A After my deposition.

Q Is it addressed in any of your reports?

A It is not.

Q So did you testify about it in your deposition?

A I did not.

Q Have you had a chance to look at it?

A I have.

MR. HAMILTON: Your Honor, this document was produced belatedly. I'm not objecting to it. And counsel, I've already discussed it with him. So we're going to proceed with this. We're going to consider it as a supplement to the reports under the rules.

JUDGE PAYNE: Well, 50 is admitted and corrected 50 was admitted, too, right?

MR. HAMILTON: That's correct, Your Honor.

JUDGE PAYNE: Without objection?

MR. HAMILTON: That's correct, Your Honor.

JUDGE PAYNE: All right.

BY MR. HAMILTON:

Q All right. Have you had a chance to look at it?

A Yes.

Q What does it purport to show?

A The first and fourth columns replicate the analyses that were found in my reply to Brunell. So those are reporting statistics that were reported in my previous report, at least in the enacted plan, not in the Alternative Plan.

Q What's been added?

A Added are two additional columns, one reporting statistics in column two. It's labeled "In enacted District 3." These would be VTDs that were in enacted District 3 and benchmark District 3. Mr. Morgan used the word "enacted" where I used the word "adopted" to describe the adopted or enacted congressional redistricting plan.

Q So there's some additional data that's been added by Mr. Morgan to your VTD analysis that was in your report; is that right?

A Right. This—

Q Is that right, sir?

A I believe so, yes.

Q Thank you. Have you had a chance to review Mr. Morgan's testimony about this exhibit in his deposition?

A I have.

Q Did he testify in his deposition that he created the table from data that you used in preparing your report?

A Yes, he did.

Q Is that possible?

A No, it is not.

Q Why not?

A Because there were no benchmark identifiers that were provided to Mr. Morgan.

Q When was that data first provided to you?

A About four o'clock yesterday.

Q Let me direct your attention now to Plaintiffs' Exhibit 54 and 55.

A Yes.

Q What are those two documents?

A 54 is a—is the spreadsheet that was—a printout of the spreadsheet that was provided to us by Mr. Morgan.

Q That's 54, the paper. So if the Court were to open that up, is it easy to read?

A No.

Q And Exhibit 55, what's that?

JUDGE PAYNE: Excuse me just a minute, Mr. Hamilton.

Are you right now in the process of impeaching Mr. Morgan? Is that what's going on?

MR. HAMILTON: I'm actually trying—it's a little bit of two things, Your Honor. What I'm trying to do is lay a foundation for the next exhibit that's coming, which is 56 and 57. It is, candidly, a bit of Impeachment.

JUDGE PAYNE: That should wait until after Dr. Morgan testifies and use that in rebuttal. You don't have to anticipate everything that's going to happen.

MR. HAMILTON: I totally recognize that, Your Honor.

JUDGE PAYNE: Because the way we can deal with it best is to get to the point that you want to, leave the Impeachment alone, and you don't ever need to use it if, in fact, he admits on cross-examination the points you want to do.

MR. HAMILTON: Unfortunately, Mr. Morgan doesn't understand what we've done. So the corrected table, in our view, isn't corrected, and I'm going to have the witness explain Exhibit 57, which is an update using the data that became available last night at four o'clock.

JUDGE PAYNE: Have him do what he did. Just what he did. You don't need to—we don't know yet what Morgan's actually going to say in response to whatever y'all talked about yesterday. And let's let that develop. And then you'll have an opportunity to call the witness back in rebuttal or to cross-examine

on it fully. But let's stay on your case now, if you don't mind.

MR. HAMILTON: I will do my best, Your Honor, and I'm sure you'll tell me if I stray the line.

BY MR. HAMILTON:

Q Sir, you looked at the data that was provided by Mr. Morgan last night?

A Yes, I did.

Q Did you use that data to prepare another exhibit?

A In part.

Q Okay. Why did you do that?

A Well, to assure that we have all got the same facts straight, we need to be able to replicate each other's work.

Q What was it when you examined this CD - - the database that is Exhibit 55 that was provided yesterday, what did you discover?

A I discovered that Mr. Morgan had misassigned some of the VTDs in the Benchmark Plan.

Q Where were those?

A They were in Petersburg and then there were some additional ones that were located in Norfolk and Richmond.

Q Have you taken those—

JUDGE PAYNE: Mr. Hamilton, excuse me, but aren't you really just doing what we talked about? Aren't you really attacking Morgan's report? And the time to do that is when you cross-examine him and in rebuttal. Otherwise, we don't even know the context,

and you're having to build the context, then you're tearing it down. And that is distracting from understanding what your case is.

So why don't you just stay right now with your case. You can deal with this later. You're going to be given time to do it.

MR. HAMILTON: Your Honor, I would like to direct his attention to Exhibit 57, if I can.

JUDGE PAYNE: Yeah, but the way you're doing it is to do it the wrong way. That's the point. So try it and see if you can do it.

MR. HAMILTON: Okay. I'll try my best.

JUDGE PAYNE: It may not even be necessary to talk about Exhibit 57 until after Morgan testifies.

MR. HAMILTON: Okay.

BY MR. HAMILTON:

Q Okay. Dr. McDonald, please turn your attention to Plaintiffs' Exhibit 57 if you would, please. Do you *have* it there in front of you?

A Yes.

Q Did you prepare this table?

A Yes.

Q Have you added an additional column?

A Yes. Mr. Morgan's—

Q Let's not talk about Mr. Morgan. Let's just talk about what this table shows.

JUDGE PAYNE: Mr. Hamilton, it's hard for him to do that because the whole table is Mr. Morgan's and what's wrong with it. So why don't we just go on

with something else and come back to Mr. Morgan's when we need to.

MR. HAMILTON: Okay.

Q Let's take a look at Intervenor-Defendants' Exhibit 14, if you would, please, sir.

A Yes.

Q This is Mr. Morgan's report?

A Yes.

Q Have you had an opportunity to review that?

A I have.

Q Mr. Morgan, does he describe compliance with the Voting Rights Act as a consideration in redistricting?

A Yes, he does.

Q According to Mr. Morgan's analysis, how important is compliance with the Voting Rights Act?

JUDGE PAYNE: Are you trying to ask him what his opinion is on that topic?

MR. HAMILTON: I am, sir.

JUDGE PAYNE: Then do that without reference to Morgan's. You're not here to attack Morgan in this part of your case. So just ask him what his opinion is on the topic, if you will, and that I think will get us where you want to be, and then we'll move on. And when Morgan comes on, you'll have plenty of chance to cross-examine him, and you can put on this witness as a rebuttal witness.

BY MR. HAMILTON:

Q Dr. McDonald, how do you determine whether a districting change diminishes the ability of minority voters to elect their candidate of choice?

A The way to ascertain that is to conduct a racial bloc voting analysis.

Q Is there any other kind of analysis that would allow you to determine how many black voting-age residents are needed to preserve the ability to elect a candidate of choice?

A There are many flavors of racial bloc voting analyses, but you'd have to do one of those sorts of analyses.

Q Do you know whether there was any racial bloc voting analysis performed by anyone with respect to the Virginia redistricting in 2011 or 2012?

A I do not.

Q How about just comparing the black voting-age population in the Benchmark to the Enacted Plan, is that sufficient?

A It is not.

Q Why not?

A Well, the Department of Justice says in its guidelines that that is not sufficient, and the reason is is that you have to look at the racial patterns of voting within the district. You have to know whether or not there's going to be sufficient white crossover voting to elect a candidate of choice in the new district.

So it's feasible that you could even increase the minority percentage within a district and it still not be effective at electing a candidate of choice.

JUDGE DUNCAN: Excuse me. Is that the same as saying, as the point was made about the federal register statement, that the Department of Justice looks at electoral patterns, not Census data?

THE WITNESS: That's correct.

BY MR. HAMILTON:

Q Let's go to Intervenor-Defendants' Exhibit 32. It's in the small notebook on the edge of the witness stand.

JUDGE PAYNE: What number did you say, sir?

MR. HAMILTON: Intervenor-Defendants' Exhibit 32.

JUDGE PAYNE: Thank you.

THE WITNESS: Yes.

Q What is this?

A This is the committee hearing in the Senate on the redistricting, congressional redistricting.

Q Can you turn to page 18, please?

JUDGE PAYNE: This is the 2011 hearing?

MR. HAMILTON: That's correct, Your Honor.

JUDGE PAYNE: Not the 2012?

MR. HAMILTON: The hearing on April 7, 2011.

Q Do you have page 18 in front of you, sir?

A I do.

Q Who is Senator Vogel?

A She was a sponsor of one of the congressional redistricting plans.

MR. CARVIN: Same objection. All of this parsing through the legislative history is no part of his

expertise. They are trying to use him as a vehicle to get the plaintiffs' view of the legislative history.

MR. HAMILTON: Your Honor, it's in the record. It's an uncontested exhibit. I'm happy to move on.

JUDGE PAYNE: I know it' s in the record, but his objection is far different than that, and that's not something upon which he opined in the process set by the rules. And if that's the case, his objection is sustained. And it sounded to me like you agree that it was.

So let's move on.

MR. HAMILTON: I agree.

BY MR. HAMILTON:

Q Sir, are you familiar with the Department of Justice preclearance practice?

A I am.

Q Was CD 3 in 2001 precleared by the Department of Justice?

A It was.

Q What was the black voting-age population then?

A That was in a previous slide. I believe it was 53.2 percent using the exclusive method.

Q So let's focus on 2011. We weren't just redrawing districts for congressional elections. We were also redrawing General Assembly districts; is that true?

A That's true.

Q Were any of those legislative districts below 55 percent?

A Yes, they were.

Q Were those precleared by the Department of Justice?

A They were.

Q When were they precleared?

A In 2011.

Q Was that before or after the General Assembly took up the—passed the congressional redistricting map?

A It was before.

Q Where would we find that information in the record?

A That would be in the Section 5 submission for the Senate districts.

Q Okay. Is it also in one of your reports?

A It is.

Q Which report?

A My rebuttal report to Mr. Morgan.

Q Take a look at Plaintiffs' Exhibit 30, if you would, please.

A Yes.

Q Is that your reply report?

A It is.

JUDGE PAYNE: What page?

Q Direct your attention to page 2.

A Yes.

Q That's the table with respect to the state Senate district, sir?

A Yes.

Q And those were all precleared by the Department of Justice?

A Yes.

Q All right. Let's turn to a couple of other points. First of all, tailoring. Can you explain what narrow tailoring means with respect to redistricting?

A That once race is determined to be the predominant factor in the creation of a redistricting plan, that the district should be drawn such that it has just enough population, black population, within it to achieve the goal of producing a district able to elect a candidate of choice while also, again, not subsuming traditional redistricting principles.

Q Do you understand what Virginia has identified as a compelling interest to justify the consideration of race in this case?

A Yes, compliance with Section 5.

Q Assuming for the sake of argument that Virginia's compelling interest was that, did you reach an opinion about whether enacted CD 3 is narrowly tailored to serve that interest?

A I did.

Q What is that conclusion?

A That it was not.

Q Why?

A Because traditional redistricting principles had been subsumed in order to increase the black voting-age population of the district.

Q How would one know how many black voting-age residents were needed to protect their ability to elect a candidate of choice?

A One would perform a racial black voting analysis and from that analysis determine what percentage was needed to elect a candidate of choice.

Q Did you do such an analysis in this case?

A Yes, I did.

Q Where could the Court find that if it wanted to?

A That report would be in my rebuttal to Dr. Brunell, if I'm correct.

Q Take a look at Plaintiffs' Exhibit 30.

A Yes.

Q Is that where the—is that where your racial bloc voting analysis—

A Yes, it's in my reply to Mr. Morgan, not to Dr. Brunell.

JUDGE PAYNE: What page are you talking about referring to the page?

MR. HAMILTON: Page 4, Your Honor.

JUDGE PAYNE: Page 4?

MR. HAMILTON: (Nodded head affirmatively.)

BY MR. HAMILTON:

Q Could you describe to the Court your racial bloc voting analysis and how you went about that?

A Well, racial bloc voting analysis, generally what they do is you correlate the voting results within precincts with the racial character or minority character of the precincts. And generally what you find is that higher black, in this case, voting-age population precincts tend to have a higher vote share for the African-American candidate of choice. And

from that correlation, one can infer how African-Americans—the levels of support that African-Americans have for the African-American candidate of choice and what whites also, or non-blacks, have for support for the African-American candidate of choice.

Q What conclusion did you reach as a result of your racial bloc voting analysis?

A Well, first, that there is racial polarization, but that there's also a substantial amount of white crossover voting for the African-American candidate of choice such that a district that was not necessary to increase the black voting-age population of the district in order to elect a candidate of choice.

Q Is there a table that summarizes your conclusions in your report?

A Yes, it's at page 5.

Q Page 5. So did your analysis show whether it was necessary to increase the black voting-age population in the Enacted Plan to ensure that there would be no retrogression?

A I believe that—it's my expert opinion that it was not necessary to increase the black voting-age population of the district in order to elect an African-American candidate of choice.

Q Why is that?

A Because there was sufficient support for—well, there's a number of factors here. One is that this racial bloc voting analysis shows that there's sufficient level of support. The other is the Senate analysis or black voting-age population, which we just looked at, a third is the historical black voting-

age population in the district that was precleared by the Department of Justice.

And the fourth is the voting results for Representative Scott, the historical voting patterns within that district over the course of the last decade.

Q Are you familiar with plaintiffs' alternative map for Congressional District 3?

A I am.

Q What districts does the Alternative Plan change?

A It only changes the shared boundary between the Second and the Third Congressional Districts.

Q Can you describe the changes made by—well, first of all, is the Alternative Plan up here on the easel?

A Yes, it's the one that's on the right.

Q Instead of the left?

A Yes.

Q Okay. So can you describe the changes made by the Alternative Plan?

A What the Alternative Plan does is it makes the localities of Newport News, Hampton and Norfolk whole by placing all of Newport News and Hampton within the Third Congressional District and all of Norfolk within the Second Congressional District. It gives almost all of Portsmouth to the Third Congressional District except for a very tiny sliver that's connected through a tunnel in order to balance back the populations of the Second and Third Congressional Districts. That population is 1,018, if I recall correctly.

Q Did you prepare a report analyzing the Alternative District?

A I did.

Q Turn to Plaintiffs' Exhibit 29, if you would, please.

A Yes.

Q What is that?

A This is my analysis of the Alternative Plan.

Q Did you examine compactness?

A I did.

Q Did you reach a conclusion—what was your conclusion with respect to compactness?

A That the Third Congressional District was no longer the least compact district.

JUDGE PAYNE: What exhibit are you talking about?

MR. HAMILTON: Excuse me, Your Honor?

JUDGE PAYNE: What exhibit are you referring to?

MR. HAMILTON: I'm referring to Plaintiffs' Exhibit 29, which is Dr. McDonald's report analyzing the Alternative District.

JUDGE PAYNE: Sorry. I just heard the wrong number.

BY MR. HAMILTON:

Q All right. Do you summarize your analysis of the compactness of the Alternative Plan in your report that's contained in Exhibit No. 29?

A Yes.

Q Where would we see that?

A It's in the section that's labeled "Compactness." It starts on page 6 of my report.

Q And it continues to page 7?

A Correct.

Q What does the table show?

A Again, that the Alternative Plan is no longer—the Third Congressional District in the Alternative Plan is no longer the least compact district.

Q Is that consistent or inconsistent with visual inspection?

A Yes.

Q Is it consistent or inconsistent?

A Sorry. Yes, it's consistent with visual inspection as you can clearly see from the two exhibits.

Q What statistical tools did you use to measure the Alternative Plan and compare it to the Enacted Plan?

A I used the same compactness scores that had been used previously in my expert report and the Commonwealth of Virginia had provided in their Section 5 submission, the Reock, Polsby-Popper and Schwartzberg measures.

Q Let's turn to contiguity. Is Alternative CD 3 contiguous?

A Yes, it is.

Q Is it in any way different in its contiguity with respect to the original Enacted Plan?

A Yes, it's no longer using water as a means to bypass racial communities.

Q Is it contiguous by land?

A Yes, it is.

Q Let's turn to respect for local political boundaries, the third traditional redistricting criteria. Is that discussed in your report?

A It is.

Q Where?

A On page 4 of the summary tables that starts on page 3 is the discussion.

Q What does the summary table show?

A That the number of locality splits has been reduced in the Third Congressional District.

Q How do the Alternative and Enacted Plans compare on this score?

A They're similar. I mean, the Third Congressional District does have nine locality splits and the Alternative Plan has eight locality splits.

Q Did you look at VTD splits?

A Yes, I did.

Q Where would we find that in your report?

A That's Table 2, which is directly under Table 1.

Q How does the Alternative and Enacted plans compare on that score?

A Again, the Third Congressional District still has the most, but the number of VTD splits has been reduced from 14 to 11.

Q What localities would no longer be split between CD 2 and CD 3 under the Alternative Plan?

A Well, the localities that would no longer be split would be Norfolk, Hampton and Newport News.

Q What does the last row in that Table 3, the total population split, on page 5 of your report show us?

A It's illustrating that the—if you look at the map visually, you can see that a substantial geography of Norfolk, Hampton and Newport News is split between the Second Congressional District and the Third Congressional District. That geography represents population. In fact, it represents hundreds of thousands of people.

So what's happening here in the Third Congressional District is that in the Alternative Plan, by making Newport News, Hampton and Norfolk whole and splitting only a sliver of Portsmouth, the affected populations by splits of these localities between the Second and Third Congressional District have been reduced from 241,096 people to 1,016.

Q Does the Alternative Plan put two incumbents in the same district?

A Not to my knowledge.

Q How does Alternative CD 3, when you take all these considerations together, compare with Enacted Plan CD 3 with respect to the traditional redistricting criteria?

A It fares better on these traditional redistricting criteria.

Q All of them?

A Yes.

Q You hesitate.

A Well, it's also moving a substantial amount of population in and out of the Third Congressional District.

Q All right. Let's turn to how the Alternative and Enacted Plans compare in terms of their treatment of black residents. What's the BVAP percentages in Alternative CD 3?

A The Alternative CD 3 using the inclusive method, I recall it's 51 percent.

Q 51 percent. Where would we find that in your report?

A That would be on—

Q Is that Plaintiffs' Exhibit 29 at page 1?

A Perhaps. If I can get there. I do not see it on that page. Yes, there it is in the first paragraph.

Q So what's the black voting-age population in Alternative CD 3?

A It's 51.0 percent.

Q What's the black voting-age population using the inclusive method in Enacted CD 3, so we're comparing apples to apples?

A In Enacted CD 3, it's 57.2 percent.

Q In your professional opinion, would the black residents in Alternative CD 3 be able to elect their candidate of choice?

A Yes.

Q How do you know that?

A Yes.

Q I said, "How do you know that?"

A Through the analyses of the four different facts that I discussed previously.

Q Your racial bloc voting analysis?

A Yes.

Q What do you calculate to be the percentage of voters who would support the black candidate of choice in Alternative CD 3?

A Please say that again.

Q What do you calculate to be the percentage of voters who would support the black candidate of choice in Alternative CD 3?

A I would need to look back at that number. If you can point me to it, I would appreciate it.

Q Look at Plaintiffs' Exhibit 30, page 5.

A Can you state the question again?

Q What do you calculate to be the percentage of voters who would support the black candidate of choice in Alternative CD 3?

A You're asking me a question about all the voters together.

Q Let me rephrase the question then. How would you characterize the chances of the black candidate of choice being elected in Alternative CD 3?

A Very high.

Q In the last election under the Benchmark Plan, the black voting-age population in CD 3 was what?

A Sorry. I'm starting to lose you here. Say that again for me.

Q What was the black voting-age population in CD 3 under the Benchmark Plan?

A CD 3 under the Benchmark Plan was 53.9 percent.

Q How did the minority candidate of choice do?

A The minority candidate of choice in 2010 won 70 percent of the vote.

Q After the Enacted Plan was adopted—

JUDGE PAYNE: Isn't this the same thing we've been over before?

MR. HAMILTON: I was laying a foundation to ask him the next question, Your Honor.

JUDGE PAYNE: Okay. Why don't you just ask him that one because we got the first part of it.

Q According to your analysis of the black voting-age population, how would the minority candidate of choice likely do?

A He would win that election.

Q Have you looked at the Alternative Plan with respect to whether it's narrowly tailored?

A Yes.

Q What conclusion did you reach there?

A That this District race is still the predominant factor in the creation of this District, but now the black voting-age population has been reduced, the way in which the District now has greater respect for local political boundaries. It's no longer using water to circumvent racial populations. It's much more compact in its shape. So there it's more narrowly tailored to achieve the goal of electing an African-American candidate of choice.

Q The last thing I'd like to discuss with you, sir, racial balance. In your opinion, does the Alternative

Plan create greater racial balance than under the Enacted Plan?

A Balance, as I understand it, means something that's 50/50. And so 51 percent would have a greater balance than 57.2 percent.

Q How about CD 2?

A What about CD 2?

Q How would it fare under the Alternative Plan on this measure of racial balance?

A It would have more African-Americans within it, so it would have—it had fewer than 50 percent, so it would have more of a balance between the two races.

Q If we were instead to use balances not just within the population totals within the district but comparing district to district, does the Alternative Plan improve or degrade the racial balance between CD 2 and CD 3?

A It improves it.

MR. HAMILTON: Thank you, Dr. McDonald.

I very no further questions at this point.

JUDGE PAYNE: Mr. Carvin, Mr. Melis, who' s going to cross-examine? You have different interests, so who's going to start?

MR. CARVIN: Do Your Honors have an idea of when we would be breaking for lunch?

JUDGE PAYNE: About one o'clock.

MR. CARVIN: One o'clock.

CROSS-EXAMINATION BY MR. CARVIN:

Q Good afternoon, Dr. McDonald.

JUDGE PAYNE: That doesn't mean you have to be finished by one o'clock.

MR. CARVIN: I apologize, Your Honor?

JUDGE PAYNE: That doesn't mean that sets a constraint on your cross-examination.

MR. CARVIN: No. I was just trying to figure out the break point. Thank you. Your Honor.

BY MR. CARVIN:

Q In terms of your background, just to be clear, I did not retain you in Arizona.

A That's correct.

Q Now, the changes that were made to District 3 in 2012, you attribute those to race, correct?

A Predominantly, yes.

Q And District 3 is adjacent to four other districts, correct?

A Correct.

Q And in 2012, District 3 swapped population with all four of those districts, right?

A Correct.

Q And District 1 is adjacent to District 3?

A Correct.

Q And that has a Republican incumbent, Whitman, correct?

A Correct.

Q And District 2 is adjacent to District 3, correct?

A Correct.

Q And that has a Republican incumbent, Rigell, correct?

A Correct.

Q And in 2012, he was a new incumbent, correct?

A Correct.

Q He had beat a Democratic incumbent in 2010?

A Correct.

Q Under the Enacted Plan, he's in a toss-up district?

A It's one that had gone back and forth over the last decade.

JUDGE PAYNE: Excuse me. Are you saying that CD 3 is a toss-up district?

MR. CARVIN: No, CD 2.

JUDGE PAYNE: CD 2 is a toss-up district; is that what you said?

THE WITNESS: Yes, it's a district that moved back and forth between the parties over the last decade.

JUDGE PAYNE: I'm having a little trouble hearing you.

JUDGE DUNCAN: Would you mind asking the question again, please?

Q Under the Enacted Plan, District 2 with new incumbent Rigell in it is a toss-up district, correct?

A Yes, it's a district that moved back and forth between the parties, yes.

Q And District 4 is adjacent to District 3, correct?

A Yes.

Q And that has a Republican incumbent in it?

A Yes.

Q Republican incumbent Forbes?

A Yes.

Q And District 7 is adjacent to District 3?

A Yes.

Q And the current occupant of that seat is Republican incumbent Cantor, correct?

A Yes.

Q Now, you did not specifically analyze the political effect of the swaps between these districts, correct?

A Correct.

Q And you say that there is a clear racial pattern in these swaps, correct, as you testified on direct?

A Yes.

Q And I'd like to focus on whether there's an alternative non-racial explanation, whether these swaps had a political effect and a political purpose.

A Okay.

Q And Mr. Morgan did analyze the political effect of the swaps between District 3 and the four adjacent Republican districts, right?

A Yes.

MR. CARVIN: If it's all right to expedite things, I'd like to hand the witness a binder that encompasses different exhibits so they are already there. So we don't have to keep switching back and forth between books.

And I'd also like to provide Your Honors with the same binders.

JUDGE PAYNE: That will be fine. Thank you.

These are just what you want to use in cross-examining Dr. McDonald?

MR. CARVIN: Exactly, but they're from three different books. I just thought it would be easier.

JUDGE PAYNE: Yes, it will be easier than flipping back and forth.

BY MR. CARVIN:

Q Do you have that book in front of you now?

A Yes, I do.

Q I'd like to—if you could, turn to Tab 5, please, which is Intervenor-Defendants' Exhibit 13.

A Yes.

Q If you could turn to page 13 of Mr. Morgan's report, which is Intervenor Exhibit 13.

A Yes.

Q We went through this in a lot of detail in the deposition. So keeping with Judge Payne's admonition, just to cut to the chase, the bottom line is that all of these swaps between District 3 and the four adjacent Republican districts were politically beneficial for the Republican incumbents, correct?

A To a certain extent, yes.

Q Okay. Well, if you want to go through it in detail, we can. Let's start at the bottom. Okay?

This is, just to be clear, a chart that shows what was taken from the Benchmark District 3 and placed in the adjacent districts and what was taken in the Benchmark Adjacent Districts and placed in Benchmark 3, correct?

A Correct.

Q So let's start at the bottom of the chart. In terms of the partisan composition of the populations that were taken from District 3 and put into Representative Cantor's 7, they were roughly 36 percent Democratic and 34 percent Democratic, correct?

A I'm sorry. I'm not following that.

Q All right. If you could look at the bottom of page 13, table 8.

A Yes.

Q Now we're looking at what kind of population was shifted from the black Democratic District 3 to Representative Cantor's District 7?

A Yes.

Q Okay. And the partisan composition of the people who went from 3 to the Republican district was, roughly, if you want to look at it this way, 63 percent Republican or 64 percent Republican.

A I think you had said previously "Democratic." That's why I lost you. Okay. Yes, I agree with that.

Q I think I said 36 percent Democratic, but it's the same thing.

A Yes.

Q And the 36,000 people or so who were moved from Representative Cantor's district into District 3 were roughly 85 percent Democratic or 86 percent Democratic, correct?

A Correct.

Q So that was politically beneficial for Representative Cantor. He was gaining 64 percent

Republican population and losing 86 percent Democratic population, correct?

A Well, with a caveat to it.

JUDGE PAYNE: Does that mean yes, but with a caveat?

THE WITNESS: Yes, but with a caveat.

Q The caveat being?

A We actually don't know how Cantor performs with these particular constituents. We know the presidential election results within this population, but we don't know how he would fare. And there are instances of districts around the country where you find Democrats and Republicans—I know it's rare, but there are people who can win in districts that are of the other political persuasion.

Q And you haven't examined whether this rare phenomenon exists in District 7, right, where people who voted for John McCain and Mitt Romney don't vote for Eric Cantor?

A No one has.

Q The answer is no, you have not looked at it?

A No.

Q So your caveat is not based on any actual political analysis you've done, correct?

A Correct.

Q Now, in terms of District 3 and District 4, again, District 4 is Republican incumbent Forbes' district?

A Yes.

Q In 2012. And he shifted population to District 3, and the population that was shed from Republican incumbent Forbes' district to District 3 was roughly 86 or 88 percent Democratic, correct?

A Yes.

Q And the population that he picked up from District 3 was, first of all. a much smaller population, correct?

A Correct.

Q It was roughly one-seventh of the population that he shifted to District 3, correct?

A Correct.

Q Whereas, District 4 sent 35,000 people to District 3, District 4 only picked up 5700 people from District 3?

A Correct.

Q Among that relatively small group, they were 53 or 55 percent Democratic?

A Correct.

Q Again, absent your unexplored caveat, that would be politically beneficial for Representative Forbes, correct?

A Yes.

Q Then we'll turn to Districts 2 and 3. And here the population shifted between District 2 and District 3 was roughly equivalent, right?

A Yes.

Q 25,501 going out, 27,917 coming in—

A Yes.

Q —to District 3?

A Yes.

Q So in terms of the population that the Republican incumbent Rigell shed from District 3, that was roughly 64 percent or 69 percent Democratic, correct?

A Yes.

Q In the presidential election.

And in terms of the population that he picked up, that was roughly 47 or 48 percent Democratic?

A Yes.

Q So, again, absent your unexplored caveat, that would be politically beneficial for Republican incumbent Rigell, correct?

A Correct.

Q Now, Whitman is a bit more complicated. The people that went from District 1 to District 3 was roughly or exactly 23,288, right?

A Yes.

Q And the people coming into District 1, Representative Whitman's district, was a much smaller population of 7,351, correct?

A Yes.

Q Now, the people that went into District 3 from Representative Whitman's districts were 60 to 66 percent Democratic, correct?

A Yes.

Q And the people that went into District 1 were actually slightly higher Democratic, 75 or 76 percent Democratic, correct?

A Yes.

Q But even though there was a slightly higher Democratic representative in terms of the people that went into District 1, the fact that there was a smaller number meant that the swaps between 1 and 3 actually produced fewer Democratic voters in District 1 than had been there in the Benchmark Plan, correct?

A Yes. I could elaborate to explain to the Court what's going on here because it is complicated.

JUDGE PAYNE: Well, just answer his question and if there's any elaboration needed, Mr. Hamilton will ask you that on redirect examination, and that's the order of things.

THE WITNESS: Okay.

Q So if a legislature wanted to enhance Republican incumbents electoral process, it would make perfect sense to do what the legislature did in the Enacted Plan, right?

A Sorry. I didn't quite follow that question. I'm sorry.

Q If a legislature wanted to enhance Republican incumbents electoral process, it would make perfect sense to make the swaps that the Enacted Plan made relative to the Benchmark Plan, correct?

A With the unexplored caveat, yes.

Q The swaps had a clear political effect then, right?

A With the caveat, yes.

Q Just like they had a clear racial effect.

A They did have a racial effect, yes.

Q Just as you inferred a racial purpose from the racial effect of these swaps, it would be fair to infer a political purpose from these swaps, correct?

A You could infer some, yes, a political purpose from just solely these statistics.

Q So if race was not a factor at all, if every person involved in these swaps was white, it would have made perfect sense to make these swaps, correct?

A Right. If we did not evaluate race at all, yes, in your hypothetical. Yes.

JUDGE PAYNE: I think, though, the question is different than that. I understood the question to be: If the race was white, it would have made perfect sense. Was that your question, Mr. Carvin?

MR. CARVIN: Yes.

JUDGE PAYNE: That's the question he asked you.

THE WITNESS: It makes sense with the caveat, yes.

BY MR. CARVIN:

Q Okay. And you did an article about the 2012 congressional redistricting, correct?

A Correct.

Q That was published in the University of Richmond Law Review?

A Yes.

Q If you could turn to, please, Exhibit 9. Tab 9, Intervenors' Exhibit 55.

A Yes.

Q Is that the article?

A It appears so, yes.

Q And you wrote this before you were retained by plaintiffs in this case, right?

A Excuse me?

Q You wrote this article before you were retained as an expert by plaintiffs in this case, correct?

A Yes.

Q When you were looking at it as a disinterested academic, you determined that this was a political gerrymander by the General Assembly, correct?

A Yes, we evaluated the partisan performance of the districts and had determined that the intent was to create an 8-3 Republican majority.

Q Right. So they purposely enhanced Republican voting power or preserved it at eight for political purposes, correct?

A Yes.

Q Let's be more specific about what you wrote in your article. If you could turn to page 2 of the article. Do you see where it says "Introduction" on page 2?

A Yes.

Q And the first two sentences read, do they not, In the 2012 general election, Virginia Republican candidates for the United States House of Representatives won a combined 70,736 more votes than Democratic candidates out of the 3.7 million votes cast for the major party candidates, yet won eight of the state's eleven House seats. This is the power of gerrymandering, correct?

A "Thus is the power of gerrymandering," but yes.

Q So you opined that there's only a slight advantage in terms of congressional votes for Republicans over Democrats in Virginia, but they had captured a largely disproportionate amount of seats, eight to three, with this narrow vote margin, that they had engaged in a political gerrymander; correct?

A Yes, that was one of the things that they were doing, yes.

Q You say that Virginia redistricting has been and continues to be mired in politics in this article, don't you?

A Yes.

Q And you say, Even if people involved in redistricting, say legislators, may have articulated neutrally districting criteria that are nominally devoid of political considerations, the truth is that such political considerations are at the forefront, though, for those who conduct redistricting, correct?

A Well, at times those neutral criteria can themselves have a race conscious effect that's behind them.

JUDGE PAYNE: I think, Dr. McDonald, please listen to the question. He asked you a question about what you said. And if there's an explanation needed in response to that answer, Mr. Hamilton will be free to call upon you to give that explanation.

Do you want to try again, Mr. Carvin?

BY MR. CARVIN:

Q You opined in this article and you believed that although people enacting the redistricting plans may profess that they are acting pursuant to neutral redistricting criteria that are nominally devoid of political considerations, the reality is that such political considerations are at the forefront for those who conduct redistricting, correct?

A No.

Q If you could turn to page 2 of your report there right underneath what I just read.

A The Law Review?

Q Yes. Page 2.

A Yes.

Q Same page. And I'm going to read you the second to the last sentence in that same first paragraph.

"These administrative goals are nominally devoid of political considerations, but such considerations are at the forefront of those who conduct redistricting." Is that what you wrote?

A Yes.

Q When you said, "these administrative goals," you meant a political criteria that you had referenced in the prior two sentences, correct?

A Yes, traditional redistricting principles.

Q And you actually examined in Virginia whether or not the disproportionate representation of Republicans was attributable to these neutral criteria or by conscious line drawing by Republicans to maximize their representation, correct?

A Sorry, I lost you in that question.

Q Well, okay. There's a theory out there, right, that even though Republicans wind up with eight seats out of eleven when the vote tally was roughly split down the middle, but that could be attributable to the fact that Democrats tend to concentrate themselves in the same districts?

A Yes.

Q And, therefore, even use of neutral criteria will produce a disproportionate Republican representation. In layman's term, Democrats have essentially packed themselves into districts; is that right?

A I think this is where I'm having my disagreement with you.

Q Can you answer the question?

A Yes.

Q And you actually examined in this article whether or not the disproportionate representation of Republicans in Virginia was attributable to these neutral demographic factors or to the fact that the legislature had consciously drawn the line to get to an eight-three partisan division, correct?

A Correct, with an explanation.

Q Okay. Why don't we just turn to page 12 and the article can speak for itself.

I think the first full paragraph at the top of 12 describes what I just said. If you look at the second sentence, you wrote, did you not, "Any set of measures may carry a set of second-order biases, such that adherence to ostensibly neutral administrative criteria may produce a gerrymander

affecting electoral outcomes of partisan balance, competition, and racial representation," correct?

A Correct.

Q And then you further explain this in the last sentence of that paragraph. You say, "Some have claimed that this is primarily the result of drawing districts that adhere to administrative criteria and not a product of partisan Republican gerrymandering, as Democratic voters are believed to be inefficiently concentrated in urban areas from a redistricting standpoint," correct?

A Yes.

Q So what you did in this article then was try and figure out whether the fact that the Republicans had gathered eight seats was attributable to this inefficient concentration versus the way the General Assembly consciously drew the lines for political purposes, correct?

A That was one of the goals, yes.

Q Okay. And the way you examined that was you looked at neutral plans produced by neutral people, including the commission you worked on, correct?

A I wouldn't call all of those plans neutral. They all had certain inherent criteria that were being attempted to be achieved in all those plans.

Q But in terms of the line drawers' intent, you looked at people who weren't trying to maximize partisan balance for either party, and then you compared the results of what those districts did to the results in the General Assembly's plan, right?

A Yes, with that caveat about whether or not they are neutral or not, yes.

Q Okay. Well, maybe you can turn to page 21 of your article. And this time I'm going to direct your attention to the third full paragraph.

A Yes.

Q And your first sentence, you've just gone through these alternative plans by at least these ostensibly neutral line drawers and seen what kind of partisan balance they produced. And you explained—

JUDGE PAYNE: Is that right? Had you just done that in the article? You shook your head yes. You need to be on the record.

THE WITNESS: I'm reading the sentence right now is what I'm sort of nodding along with.

Yes, we looked at a number of plans at this point. Yes, we had done this analysis.

Q And you analyzed the partisan effect that would be produced by those plans, right?

A Correct.

Q And you say, "The numerous congressional plans demonstrate that the Republican legislature had a choice to create a Republican-favored congressional plan and was not mechanically following administrative criteria that resulted in a Republican-favored plan created as a byproduct of Democrats' inefficient concentration in urban areas," correct?

A Correct.

Q So you concluded that the General Assembly's strong preference for Republicans was not attributable to these neutral criteria but to conscious choices the legislature had made, correct?

A That's my conclusion, yes.

Q And we can do this as slowly or as quickly as you want, but the way you explain that conclusion in the next three sentences to say, We've looked at these other plans that have majority-minority districts and that have similarities to the General Assembly plan and they only produce a 6-5 Republican-Democratic partisan balance, correct?

A Some of these plans, yes.

Q But that was the basis for your conclusion that the 8-3 was a result of conscious decision making by the legislature because these other plans with similar characteristics had only produced a 6-5 Republican advantage, correct?

A We were using these comparisons to draw this conclusion, yes.

Q So your last sentence says, "Partisan balance in the congressional plan thus was not constrained by geography," correct?

A Yes.

Q It's a product of conscious choice by the legislature?

A Yes.

Q While we're here, before we leave, one of the things you looked at was whether or not the plans had minimized splits of local political boundaries, correct?

A Yes.

Q And if you look at the third sentence from the top, you say, "The adopted plan's partisan bias is not a consequence of favoring minimal splits of local political boundaries either." And you say, "While the adopted plan scores highly in this regard with 3 7 splits, plans with a similar amount of splits come to the 6-5.

But the relevant point is that you think the legislature's plan scored highly in terms of minimizing boundary splits, correct?

A Compared to these other plans, yes.

Q Written by, among others, the commission that you were on, right?

A Well, I was not a member of that commission, no.

Q You oversaw the congressional line drawing for the commission?

A Yes. The students were the ones who actually drew the districts, yes.

Q But you gave them parameters, right?

A I gave them some parameters.

Q And one of the commission's parameters—we're going to come back to this in detail—was to minimize the number of jurisdictional splits to the extent practicable, correct?

A Yes, that was one of the commission's criteria.

Q Okay. Now, if you could turn to the precise analysis you did of the partisan balance in these plans, which I think is outlined on page 14 of your article.

A Yes.

Q Just so everyone is oriented, this is a table analyzing, among other things, splits and Republican leans of the various alternatives you were looking at, correct?

A Correct.

Q Okay. And just so everybody knows what we're talking about, Adopted is the plan that was enacted, correct?

A Correct.

Q And Dem was the leading Democratic alternative introduced in the legislature by Senate Locke, correct?

A Correct.

Q Option 1 and Option 3, do you see that?

A Correct.

Q These are the three options that the commission that you were an adviser to proposed for the legislature's consideration, correct?

A Correct.

Q All right. And let's look first at the Republican lean column. Okay? Do you see that?

A Yes.

Q And that tells you how many seats you think are going to lean Republican in the various plans proposed, correct?

A It's the—well, not correct. I can give you the precise definition if you wish.

Q Yes.

A So we're using the 2008 presidential vote here.

And using that as a measure, it's similar to those statistics that you were just presenting from Mr. Morgan.

Q So when you were in academia and you were trying to assess the partisan balance, you used the 2008 presidential vote that Mr. Morgan used to assess the partisan composition of these districts, correct?

A Correct.

Q And you didn't issue any caveats in this article that this may not reflect the actual underlying congressional vote in these districts, correct?

A No. This is, again, this is a normalized vote, which is a very standard sort of way to do it in academia, but, again, there's incumbency advantage and other things that factor into these when we actually do analyses for specific incumbents. There's nothing in here about incumbents.

Q When you did your partisan analysis and published it pursuant to normal political science standards, you determined that the adopted plan would have eight Republican lean districts, right?

A Correct.

Q Which preserves the amount of districts and the amount of Republican incumbents in the Benchmark Plan, correct?

A Yes.

Q And the Dem alternative would give only seven seats to Republicans, right?

A Right.

Q Do you see that Dem 7?

A That's correct.

Q In this fight between the 8-3 Republican-sponsored alternative and the 7-4 Democratic-sponsored alternative led to an impasse in the legislature in 2011, correct?

A Correct.

Q The Democrats would not pass the 8-3 Republican-preferred alternative and the Republicans would not pass the 7-4 Democratic-preferred alternative, right?

A Correct.

Q Therefore, no plan passed in 2011?

A Correct.

Q It wasn't until the Republicans gained effective control of the Senate in 2012 that they were able to pass this Enacted Plan, correct?

A They gained control in 2011, but they passed it in 2012, yes.

Q The 2011 election?

A Yes.

Q Almost the day they took control, they passed it, correct? January 20?

A Yes. It was very soon afterwards.

JUDGE PAYNE: They were elected in 2011, but they took control in 2012; is that what you're saying?

THE WITNESS: Yes, that's correct.

JUDGE PAYNE: When they were sworn in.

THE WITNESS: Some people, not from Virginia, often think that we have these odd-even numbered year elections. So I was just clearing that up in the record.

Q If you could turn to page 10 of your article, and if you could look at the second full paragraph in your article, please.

A Yes.

Q And you described this impasse. In the first sentence you write, "While the General Assembly was able to reach a bipartisan compromise to redistrict the two chambers controlled by different political parties." I'm going to pause there. But they were unable to reach a compromise on the Senate plan and on the House of Delegates plan, correct?

A Yes.

Q That's what you meant by that?

A Yes.

Q You go on to say, "It was unable to reach agreement on a congressional plan," correct?

A Correct.

Q Then you say, "The sticking point was whether to protect all incumbents, giving the Republicans an 8-3 edge among the state's eleven districts, or to restore the African-American population to the Fourth Congressional District that had been shifted to the Third Congressional District during the last redistricting, yielding a Democratic-leaning Fourth Congressional District with 45 percent African-American voting-age population and reducing the Republicans' edge to 7-4," right?

A Correct.

Q So the fight was about whether or not they were going to endanger Republican incumbent Forbes in District 4 by shifting BVAP from District 3 in a way that would turn it into a Democratic-leaning district, correct?

A Yes.

Q And it was because of that desire to protect the incumbent and maintain the Republicans' 8-3 advantage that the Republicans in the General Assembly opposed it, right?

A Right. This is, again, the - - we discussed this in deposition. We are characterizing the fight as it was reported in the popular press. This is no analysis that we're doing here to talk about incumbency protection or anything of that nature.

Q What? I'm reading. There's no quotation marks around these sentences. These are your sentences.

A It's footnoted, which indicates that we're referring to another authority when we're discussing this information here.

Q I'm sorry. Normally, in Law Reviews, if the author makes an assertion, that is his assertion, and then he'll drop a footnote to support his assertion. That's what your footnotes were doing here, correct?

A We were dropping a footnote to talk about, yes—there's no incumbency protection analysis that's done in this Law Review article. So that's why I'm explaining that.

Q All right. Let's proceed a step at a time.

This paragraph reflects your conclusions, not some conclusion of some reporter that you cite in a footnote, correct?

A We are characterizing what was in the popular press at this point.

Q Where in that paragraph does it say you're characterizing what's in the popular press?

A Well, you don't always do that with every sentence that you write in every academic writing. So it's not here, but it's footnoted. So why else put the footnote there if it wasn't coming directly—if there wasn't another source for an authority?

Q I don't want to be belabor this, but the reason you put footnotes at the end of sentences in Law Reviews is to support the assertion that the author is making. So I'll ask you again. Is that the purpose of the footnote in your article?

A It's not in this case.

Q It's not? You were acting as a conduit for the article that's cited at footnote 220? You expected the reader to go read that and you were acting as sort of a ventriloquist dummy for whatever that article said?

JUDGE PAYNE: I think we have got the point, Mr. Carvin. You don't need to go any further with it.

MR. CARVIN: Okay.

Q Those articles don't say anything, do they, about incumbency protection or 8-3?

A I would have to go look them up.

Q All right. I'm going to hand you the article.

JUDGE O'GRADY: This is the article that footnote 2 02 references? Is that what you're doing?

MR. CARVIN: Just for the record, Your Honor.

Q There are two assertions, both in 204, where you cite an article, right, and then if you go back to the footnotes, that lists two different—excuse me. This would be footnote 202 or 201. And that lists two articles, right?

JUDGE PAYNE: The sticking-point sentence has a footnote 202. And that has two articles in it; is that right?

MR. CARVIN: Right.

Q If you look at footnote 202, there's an article by Mac McLean and then an article by Bob Lewis, right?

A Right.

Q And those are the articles I just handed you. In those articles—have you had a chance to review them?

A I'm looking at them right now. I have to refresh my memory with them.

Q Have you had an opportunity to review them?

A Yes.

Q In either of those articles, did they say that this was a plan to protect all incumbents and preserve the 8-3 partisan—

A It's talking about preserving Forbes versus Scott.

Q They're focusing on the one district. So they don't get into the fact that the plan protected all incumbents, right?

A Yes.

Q Just so we don't lose the point, this article suggests, this conclusion suggests, that the reason the Republicans were opposing the plan was not some gratuitous desire to increase BVAP in District 3, but because they felt that shedding BVAP from District 3 would be contrary to their desire to protect all incumbents and preserve the 8-3 balance, correct?

A I lost you on what do you mean by "this article."

Q Your article.

A My article. Because we had two other articles.

Q I apologize. I was trying to turn you—whatever you were trying—whoever you were trying to - - whatever views you were trying to convey in this paragraph, this paragraph does not attribute the maintaining the BVAP in District 3 to any gratuitous desire to pack or subordinate traditional redistricting principles, but to protect all incumbents, particularly incumbent Forbes in District 4, from the consequences of shifting a heavily Democratic population from District 3 to District 4, right?

A Right. What we're trying to do here in the article is just talk about the disagreement between the two plans, and I think we have probably mischaracterized "to protect all incumbents" because really what the disagreement is between the—really, it's what are you going to do with the Fourth Congressional District. So whether you're going to protect the incumbent in the Fourth Congressional District with these alternative plans.

Q It was eight Republican incumbents, right?

A Yes.

Q If they protected all eight, it would be an 8-3 division, correct?

A Correct.

Q If they didn't, then it would go down to 7-4?

A Correct, but we did not do any incumbency analysis here.

JUDGE PAYNE: Excuse me just a minute, Dr. McDonald.

THE WITNESS: Yes.

JUDGE PAYNE: All you have to do is answer his questions. And every time that you take an excursion to explain something, then it leads to more questions, and it protracts the examination.

Your lawyer will have an opportunity to ask—not your lawyer, but the lawyers for the plaintiffs will have an opportunity to ask you any questions that they think are important in cross-examination. And it will all go better if you just listen to the question and answer the question.

That particular one could have been satisfied by putting a period after your first word, which was "right." And that's the way usually it's goes.

Now, is this a convenient point to take lunch?

MR. CARVIN: Yes.

JUDGE PAYNE: We'll have an hour recess for lunch.

(Luncheon recess taken.)

JUDGE PAYNE: All right, Mr. Carvin. Dr. McDonald, I remind you you are under the same oath which you took earlier today.

BY MR. CARVIN: (resuming)

Q Good afternoon, Dr. McDonald. I'd just like to finish up on the article very quickly. If you can go to—again, this is tab nine in your book, Intervenor Exhibit 55. If you could go to the bottom of page 19, please.

A Yes.

Q And here you are describing what Republicans did in 2012 after they had functionally taken over the Senate following the 2011 state elections; correct?

A Yes.

Q Okay. And the last sentence on the bottom of 19 says, "In the legislature, two competing plans emerged, one from the Republicans who favored an eight-to-three partisan division of the state that protected all incumbents and one by the Democrats with the 7/4 partisan division." Is that what you wrote?

A Yes.

Q And you said, "The partisan contention involved the Fourth Congressional District represented by Republican incumbent Randy Forbes. Democrats wished to fashion this district into a roughly 45 percent African-American district, sometimes called a minority influence district, that would likely elect a Democratic while Republicans wished to preserve the district's Republican character; correct?

A Correct.

Q So the reason the GOP opposed moving substantial black population out of District 4 was

because they wished to preserve the district's Republican character, in that case District 4?

A Yes.

Q So they didn't want to change District 3 transferring BVAP to District 4 for political reasons?

JUDGE PAYNE: They did or didn't? I didn't hear your question. They did or did not?

Q The Republicans did not want to change District 3 by transferring BVAP into District 4 for political reasons; correct?

A Mostly, yes.

Q Okay. And both incumbency protection and politics are nonracial reasons; correct?

A Please restate that. I'm sorry.

Q Both politics and incumbency protection are nonracial reasons; correct?

A Yes. They can be, yes.

Q And you have no reason to think they weren't here.

A No, I do not.

Q And plaintiffs' alternative here, like the Democratic plan that was rejected in the General Assembly for political and incumbency protection reasons, transfers BVAP from District 3 to an adjacent district, in this case District 2?

A Yes.

Q And that makes it more politically difficult for the Republican incumbent in District 2, Representative Rigell; correct?

A It could, yes.

Q Now, you did not analyze the political composition of the swaps between District 3 and the adjacent districts in the way that Mr. Morgan did; correct?

A Correct.

Q Okay. But you did do a study that you described on direct where you looked at the VTDs within District 3 that had a 55 percent Democratic vote share and the VTDs in localities adjacent to District 3 that had a 55 percent Democratic vote share; correct?

A Correct.

Q If you could turn to tab two, Plaintiffs' Exhibit 28, please.

A Yes.

Q If you could—this is your second report in this case; correct?

A Correct.

Q And if you could turn to page eight of that report, please.

A Yes.

Q And the reason you selected VTDs with Democratic performance greater than 55 percent you explain in the first sentence on this page; right?

A Yes.

Q And you say that is because Democratic performance greater than 55 percent, which is above the accepted level political scientists consider to be competitive and, thus, are considered to be heavily Democratic; correct?

A Correct.

Q So a 55 Democratic vote share is considered not competitive and heavily Democratic; correct?

A With a caveat, yes.

Q What is the caveat?

A The caveat is that I have not done a full-blown competitiveness analysis for this.

Q You can have a running unexplored caveat for the rest of this testimony; okay?

A I like unexplored caveats, yes.

Q Now, just to be clear, though, the VTDs you analyze this are not those that were swapped between District 3 and the adjacent districts; right?

A Correct.

Q And they're not the VTDs that are next to the VTDs that were swapped between adjacent districts?

A No.

Q They are not?

A Some are.

Q Right, but you weren't limiting it to districts—to VTDs that were adjacent to swapped VTDs; correct?

A Correct.

Q You would have counted VTDs in the middle of District 3 in your analysis; correct?

A In some cases, yes.

Q Well, you looked at all the VTDs in District 3, correct, including those in the middle of District 3?

A Not all, because of a data limitation, but, yes, we looked at VTDs that were in District 3.

Q Just to clarify the record, when you were looking at VTDs with a 55 percent Democratic performance, you would look at VTDs in the middle of District 3.

A Correct.

Q That wouldn't have been swapped to adjacent districts unless you had dismantled District 3 and changed its form quite dramatically; correct?

A In some instances, yes.

Q Okay. So you weren't looking at VTDs that were near enough for a legislature to move them to the adjacent districts. That was not one of the limitations on the VTDs in your study; right?

A It's a double negative, but, no.

Q Okay. And the truth is, the vast majority of the VTDs that you looked at in connection with the 2012 enacted plan in District 3 were already in District 3 before the 2012 enacted plan; correct?

A Please restate that for me. I just want to understand the question.

Q I don't want to get into this debate we had this morning, but about 159 or 160 of the VTDs—let me start again. About 159 or 160 of the 189 VTDs you looked at in District 3 were already in District 3 under the benchmark old District 3; correct?

A Yes, I assume that's correct. I have not done that analysis.

Q So you really weren't trying to focus on the VTDs that were selected by this General Assembly in 2012. You included VTDs that had been selected for inclusion in the old District 3 by prior General Assemblies; correct?

A You've lost me here, because the district is, in some ways, substantially similar, so the selection of localities would be similar.

Q Right. Well, let me make it as simple as I can. They basically preserved the shape and the population of the benchmark District 3, didn't they?

A They?

Q The General Assembly in 2012.

A In some respects, yes.

Q Okay. And if they preserved—assume with me that they preserved the basic core of District 3 and most of the population. What you say were decisions to put a VDT into District 3 by the 2012 General Assembly was really just a decision by the 2012 General Assembly to continue the VTDs that were already in there; correct?

A No.

Q Well, is it not a fact that 160 of the 189 VTDs that you looked at in your study for District 3 were in the old benchmark District 3?

A Again, I take your representation to be true.

Q Okay. So the vast majority, 84 percent of the VTDs that you analyzed, were already in District 3?

A Yes.

Q Now, did you do this analysis of the plaintiffs' alternative plan?

A I did not.

Q Okay. But you did introduce—but assume with me then that in the—and the plaintiffs' alternative plan differed from the enacted plan

mainly by an effort to move a lot of black majority VTDs out of District 3 into District 2.

A Yes. That was one component of what was going on, but it wasn't solely that, because there's also Petersburg and Richmond as well.

Q I'm talking about the difference between plaintiffs' alternative plan and the enacted plan. The only difference is that they moved roughly 126,000 people from District 3 to District 2, and they were largely a black population; correct?

A Correct, yes.

Q And the consequence of this conscious effort to move VDTs from District 3 to District 2 was to reduce district three's BVAP from 56.3 to 50.2; correct?

A To 53.2?

Q 50.2.

A 50.2. So you are using the exclusive method, 51 by the inclusive, yes.

Q And even though the plaintiffs' alternative made a conscious effort to move black VTDs out, the fact remains that the 55 percent Democratic VTDs in District 3 are still 59.8 percent black; correct?

A Please say that again for me. I want to understand the question.

Q In the alternative plan—well, you make the point that in the enacted plan, the VTDs in District 3 are 59.5 percent black; correct?

A Can you point me to that statistic?

Q Yeah. It's in tab two. This is what you testified on this morning; right? So I guess it would be—

A Yes. I'm sorry. I'm trying to think about two and three, and so it's 53.9 percent by the inclusive method.

That's where I lost you on that.

JUDGE PAYNE: Between the way you all did the question and the way the answer came out, I'm not sure what you are answering. So you used the word "its," and that's an indefinite pronoun. Can you reshape the answer, or do you want him to redo the question?

THE WITNESS: I would like him to redo the question.

JUDGE PAYNE: Go ahead. Mr. Carvin, get it out fully.

Q Maybe it would be helpful to turn to where you did this analysis which was, I believe, in your second expert report.

JUDGE PAYNE: Is that tab two?

MR. CARVIN: Yes.

A The reply report?

Q Yes, tab two, Plaintiffs' Exhibit 28.

A Yes.

Q Okay. Maybe I should have done this more slowly. If you turn to page eight of that report.

A Yes.

Q Okay. And you say there, do you not, that you conclude that race, rather than politics, was driving it?

Because of the 189 VTDs assigned to the adopted Third District, the average black VTD within the Third District was 59.5 percent; correct?

A Correct, yes.

Q Okay. And then of the 116 VTDs you looked at outside of District 3, the localities, the average black VTD is 43.5 percent; correct?

A Yes.

Q Okay. Now I want you to assume with me that the plaintiffs' alternative plan, that the average amount of black VAP in the plaintiffs' alternative plan is not 59.5 percent black but 59.8 percent black.

A Okay.

Q Okay. So the plaintiffs' alternative plan, even though they were trying to get VDT, black VDTs out of District 3, they still had a black VAP of 59.8 percent.

MR. HAMILTON: Object to the form of the question, Your Honor. He's asking him to assume the conclusion and then ask him if the assumption is correct.

Q We can do this if you want by going to—

JUDGE PAYNE: I gather he agrees with your objection to the form of the question, so he's going to try again.

MR. CARVIN: Okay. I didn't want to spend a lot of time on this. We need to go to Plaintiffs' Exhibit 57 that was introduced this morning, that plaintiffs introduced.

JUDGE PAYNE: That's not in the tab?

MR. CARVIN: It's not, no. It was just handed up today.

MR. HAMILTON: Your Honor, then I would object as beyond the scope of the direct. They called it Exhibit 57. The Court directed me to address that in our rebuttal case.

MR. CARVIN: Which is why I didn't want to spend a lot of time on it, but—

JUDGE PAYNE: So why are you asking about it now? Isn't this cross-examination of his rebuttal examination?

MR. CARVIN: I'm just trying to make the point that the same criticisms he makes of the enacted plan are true of the alternative plan.

JUDGE PAYNE: Well, ask him that question.

Q Isn't that true?

A What's the question, please?

Q Isn't there a racial gap between the VTDs in the plaintiffs' alternative plan and the VTDs in the adjacent districts similar to the gap you identified in the enacted plan?

A I can't answer that question at this time.

Q Even looking at Plaintiffs' Exhibit 57, you can't answer that question?

A There's further errors in plaintiffs'—

MR. HAMILTON: Same objection, Your Honor. This is beyond the scope of direct.

MR. CARVIN: Let me make it as broad as I can.

Q District 3 has a BVAP of 56.3 percent; right?

A Okay, yes.

Q Is that true?

A 56.3. I think you are using the inclusive method again.

Q And VTDs -

A Exclusive—

JUDGE PAYNE: What's the answer?

THE WITNESS: I'm just trying to—he's—I'm sorry, Your Honor. He's switching between different BVAP numbers, and I'm trying to keep in my head which numbers that you are using here. I'm sorry.

Q Let me clarify. All of my questions will be based on the BVAP the way the Justice Department calculates it which you call the exclusive method; okay?

So under that exclusive method, is not the BVAP of District 3 56.3 percent in the enacted plan?

A The enacted plan, yes. That's the DOJ number, yes.

Q And isn't District 3 built by VTDs?

A Yes.

Q So any sample of VTDs where you take VTDs from District 3 will necessarily be more black in their composition than VTDs taken from 20 or 25 percent of white districts adjacent to District 3; correct?

A Not necessarily.

Q Have you examined that question?

A That's what the analysis is trying to get at.

Q And did you examine—okay, I'm sorry.

JUDGE PAYNE: Wait a minute. That's what which analysis is trying to get at?

THE WITNESS: The analysis we just quoted from in my report.

Q Isn't it logical to infer that if you're taking VTDs out of a majority black district, you're going to have a higher representation of black people in those VTDs than if you're taking VTDs out of a majority white district?

A Not necessarily.

Q Okay. Explain.

A We're talking about highly performing Democratic precincts to begin with, so not all of those white precincts in the surrounding localities will meet the threshold of 55 percent. So to look at that analysis, which is what I did in my report, we looked at that number.

So that is trying to get this character, but you are making a more broader general claim that all of those VTDs will be selected. They have—obviously some of them have because it's a very substantial back voting-age population in that pool of precincts that are both 55 percent.

Q And you didn't ask yourself the question—let's not get into what Mr. Morgan looked at. You didn't ask yourself the question whether the black VTDs, majority black VTDs in District 3 were substantially more Democratic than the VTDs you selected from outside of District 3; correct? You didn't analyze that issue?

A I did look at some of these precincts, yes.

Q You didn't analyze in terms of the report you provided in tab two, Plaintiffs' Exhibit 28; correct?

A Tab two...

Q You lumped together any VTD with more than 55 percent—

JUDGE PAYNE: Let him answer the question that's on the table. He was looking for his report, I guess.

A So this is, again, looking back at this on page eight?

Q Yes.

A Please ask the question.

Q You lumped together all VTDs with above 55 percent Democratic vote share. You treated a VTD with a 95 percent Democratic vote share the same way you treated a 55 percent VTD; correct?

A Yes.

Q And you didn't analyze whether or not the VTDs in District 3 tended to be more of the 90 percent or 80 percent Democratic districts than the VTDs outside of District 3, did you?

A That's in the average of the black VAP.

Q Right.

A Yes.

Q But you didn't look at what the average Democratic vote share was in those District 3 districts; right?

A Not in this report, no.

Q Or any other report.

A We only looked at—we had a cutoff, or I had a cutoff point of 55 percent or higher.

Q Right.

A Yes.

Q And you said that had an average BVAP of 59.5 percent; right?

A Correct.

Q But you didn't ask yourself what was the average Democratic vote share of those districts, did you?

A Correct.

Q And you didn't ask yourself whether the average Democratic vote shares of those District 3 VTDs was higher than the average Democratic vote share of the VTDs in the localities outside of District 3, did you?

A No. We just used that 55 percent cutoff. I just used that 55 percent cutoff.

Q Let me ask you about preserving the cores of the districts. You did not specifically analyze how much of the districts' population or cores was retained in the 2012 district, did you?

A No.

Q Mr. Morgan analyzed that; correct?

MR. HAMILTON: Object to the form of the question, Your Honor. It's beyond the scope. Now we're rehabilitating Mr. Morgan when he hasn't been impeached to begin with.

JUDGE PAYNE: Why don't we—is that your only question, is that Morgan did it?

MR. CARVIN: I can cut through it.

Q You agree, don't you, that they largely preserved the cores of all the exiting districts in the plan?

A No, I do—

MR. HAMILTON: I'll withdraw—

JUDGE PAYNE: Whoa, whoa, whoa. You are both talking at the same time. What did you say?

MR. HAMILTON: I was withdrawing the objection. Because the way Mr. Carvin rephrased the question, he wasn't asking about Mr. Morgan's report, so I have no objection.

JUDGE PAYNE: We don't have a question or an answer for the record yet.

Q Do you think that the 2012 plan enacted by the General Assembly largely retained the cores of the old districts?

A No.

Q All right. You did not analyze that issue, did you?

A I did analyze that issue.

Q You didn't analyze the population retained in the new districts from the old districts, did you?

A It's implicit in my report, yes.

Q Did you explicitly look at them?

A Yes.

Q Where?

A Where we were looking at the trades of the districts, the populations between districts. You can calculate the number that you wish needed to say something about from those statistics.

JUDGE PAYNE: That's not the question, though. The question is not whether you can do it. The question is whether you did do it, as I understand the question, and there's a difference.

THE WITNESS: Right. So, yes, the population is moved from the second—from the Third District to adjoining districts and districts into the Third District. That is a number that is in my report.

Q You didn't—there's no number in your report that analyzes how much percent of the old population was retained in the new districts for all 11 districts?

A Right. It's not calculated—

Q You gotta listen to my question—

JUDGE PAYNE: Wait a minute.

THE WITNESS: Sorry.

MR. CARVIN: Move to strike.

Q For all 11 districts, did you analyze the percentage of population retained from the old district?

A No.

Q With respect to the five districts, District 3 and the four adjacent districts, did you explicitly calculate the percentage of population retained from the old districts?

A No.

Q Okay. Could you please turn to tab five, page 24, of Mr. Morgan's report. Do you see that?

A Yes.

Q Now, he explicitly analyzed the percentage of population retained in the enacted plan and the plaintiffs' alternative plan from the benchmark districts, didn't he?

MR. HAMILTON: Objection, Your Honor. This is beyond the scope of direct. We're talking about Mr. Morgan's report before Mr. Morgan testified.

MR. CARVIN: It's not beyond the scope. I'm simply seeing if he disagrees with it so I can figure out whether or not he disagrees with our basic contention that they retained the cores of the existing districts.

JUDGE PAYNE: You can ask the question, but don't ask it with reference to Morgan or the report. Morgan is not in here ready to go and testify yet, so we need to keep the order of things in the right way, but you can ask the larger question without reference to Morgan's report.

MR. CARVIN: All right.

Q Did District 3 in the enacted plan retain 83 percent of the population from the old District 3?

A Where does that number come from?

Q I'm asking you if you disagree with that assertion.

JUDGE PAYNE: Actually what you asked him was whether it did that. Do you know if it did that or not?

THE WITNESS: It's actually found in the Section 5 submission from the Commonwealth of Virginia to the Department of Justice.

JUDGE PAYNE: So the answer is yes.

THE WITNESS: So the answer is yes.

Q And the answer is they did retain 83.1 percent; correct?

A Yes.

Q And district seven retained 88.1 percent of the old population; correct?

A I assume that's correct.

Q And District 4 retained 96.2 percent of the old population; correct?

A Again, I assume that's correct.

Q And District 2 retained 85 percent of the old population; correct?

A I assume that's correct.

MR. HAMILTON: I object, Your Honor. Now the witness—I object for lack of foundation. He hasn't established a foundation for the witness's testimony.

MR. CARVIN: He's an expert. We have made preserving cores an issue of this from the beginning. If he has a different view, I'm just trying to figure out if it has anything to do—

JUDGE PAYNE: You asked him the question, and he said he assumed it was true. Your objection is that the witness's answer is speculative? Is that what your objection is?

MR. HAMILTON: That's right, Your Honor, and there isn't foundation—

JUDGE PAYNE: That's different than whether it's speculative. Which is it, foundation or speculation?

MR. HAMILTON: Both, because he has no foundation to testify—

JUDGE PAYNE: Sustained.

Q You have not analyzed the percentage retained from the old districts to the new districts?

A Yes, I answered that question previously.

Q All right. So did District 1 retain 76.5 percent of its old population?

A I answered that I hadn't done that analysis, and so I'm assuming you are presenting the correct numbers.

JUDGE PAYNE: I think his problem, Dr. McDonald, is if you say you did the analysis, then you are bound to be able to answer the question, or you just don't remember it, or you didn't do the analysis, and he's trying to get to the point, I think, whether you actually did the analysis or did not, and if you did not, just say you didn't and we'll be done with it. If you did it, then you did it, and you don't remember where it is. And he has to then show you where it is. So let's go.

THE WITNESS: As I already answered, I have not done that analysis.

JUDGE DUNCAN: May I clarify? For District 1, are we talking about Congressional District 1 now?

MR. CARVIN: District 1 is one of the districts adjacent to—

JUDGE DUNCAN: I was just making sure I was following the colloquy.

MR. CARVIN: The last question, which admittedly undoubtedly got convoluted, was whether or not District 1 retained 76.5 percent of old District 1's population.

Q Do you agree with the plaintiffs' trial brief that the new District 3 closely resembles in shape benchmark District 3?

A That plaintiffs' alternative? Yes, except for the Hampton Roads area.

Q I'm sorry. The new enacted District 3 closely resembles the benchmark District 3?

A Yes.

Q So they essentially—if these numbers I gave you are correct, they essentially preserve the shape and the population of the old District 3 in the 2012 enactment; correct?

A Essentially, yes.

Q Now, the plaintiffs have produced an alternative plan here; right?

A Yes.

Q And that has 50.1 or 50.2 percent BVAP under the exclusive method?

A Under the exclusive method? Yeah, it's 50.2 percent, I believe.

Q And basically the only difference between plaintiffs' alternative three and the enacted three is the swaps between District 3 and District 2 that's identified on the map; correct?

A Correct.

Q In all other respects, plaintiffs' alternative District 3 is identical to enacted District 3; correct?

A Correct.

Q And alternative three, like enacted District 3, subordinates traditional districting principles to achieve the goal of creating a majority-minority district; correct?

A Please say it again for me.

Q Plaintiffs' alternative three, like enacted District 3, subordinates traditional districting

principles to achieve the goal of creating a majority-minority district; correct?

A Yes.

Q And the drafters of the plaintiffs' alternative plan drew it to achieve a 50 percent quota; correct?

A A majority district, yes. 50 percent would be a majority, yes.

Q But a bare majority?

A Yes.

Q And the purpose of the alternative plan was a majority-minority district but no more than the bare majority district; correct?

A Correct.

Q So the drafters of the alternative plan preserved as much of legislature's District 3 as they could except for their express desire to have as narrow a majority in District 3 as possible.

A Correct. That would be one of the things that they attempted to do.

Q Okay. And with respect to these changes between three and two, what they did was move a lot of high BVAP VTDs from District 3 into District 2; correct?

A Correct.

Q And those changes had a racial purpose.

A Yes. There was a racial component to those changes, yes .

Q And it's a racial gerrymander if your racial purpose is to decrease BVAP just in the same way as if your purpose is to increase BVAP; correct?

A Not—it is a racial purpose, but not necessarily.

Q Well, if you consciously decrease BVAP, that constitutes racial gerrymander in the same way that consciously increasing BVAP does; correct?

A No.

Q Do you remember having your deposition taken in this case?

A Yes.

Q On April 11th, 2014?

A Yes.

Q And I'm going to hand your deposition up. If you could turn to page 51 of your deposition, please.

A Yes.

Q Okay. And were you asked these questions and did you give this answer: "Okay, we're talking about race, the use of race predominating over traditional districting principles. So that would constitute a racial gerrymander; is that correct?

"Answer: Yes.

"And that would be true if race predominated an effort to reduce black voting-act population as well as an effort to enhance black voting-age population; correct?

"Answer: Yes."

Were you asked those questions and did you give those answers?

A Yes.

Q And you talked to the drafter of the plaintiffs' alternative plan before you did your report on it; right?

A Yes.

Q And the drafter was Eric Hawkins of the National Committee for an Effective Congress?

A Yes.

Q And he told you his goal was to draw a bare majority BVAP district?

A That was one of the goals.

Q Let's talk about the plaintiffs' alternative compliance with traditional districting principles, and again, just so nobody is misled, the board here that compares the enacted district to the alternative district only has a very small portion of these two districts in it; right?

A That's correct.

Q Everything that goes above this district, the districts are identical; correct?

A Correct.

Q And you agree that the plaintiffs' alternative district is not compact; correct?

A The plaintiffs' alternative? It is more compact than the previous, but it is still—

MR. CARVIN: Move to strike.

Q Do you agree that the plaintiffs' old—

JUDGE PAYNE: Excuse me just a minute. I know you moved to strike, but we need to have him, Mr. Hamilton, have his say, and then we need to rule one way or the other. Do you agree it wasn't responsive, Mr. Hamilton, or not?

MR. HAMILTON: I don't, Your Honor. I believe it was responsive. It was responsive to the question that was asked.

MR. CARVIN: I asked him whether or not it was compact, not whether it was more or less compact than the enacted plan.

JUDGE PAYNE: I think the motion to strike is granted. Ask the question again. Please just answer the question.

Q Do you agree that alternative District 3 is not compact?

A Agree that it is not compact? Yes.

Q And it replicates, except for this part here shown on the maps, all of the parts of enacted District 3 that you criticize as a racial gerrymander; correct?

A Yes.

Q And those criticisms apply equally, obviously, to alternative District 3 as they do to enacted District 3?

A Those areas that we are talking about not here that are on the maps, yes.

Q And one criticism of enacted District 3 is it perpetuates the non-compact benchmark District 3; correct?

Perpetuates the non-compact shape.

A Correct, yes. Non-compact shape, yes.

Q And then with respect to the changes between benchmark District 3 and the enacted plan, you criticized those as well, didn't you?

A Please restate that question for me.

Q In addition to retaining the core non-compact District 3, you also criticize enacted District 3 because of the changes that were made to benchmark District 3.

A (No response.)

Q Let me make it simple.

A Yeah, sorry. I'm not following. That's a very complicated question.

Q You criticized the trades between District 3 and District 1 and District 4 and District 7 and District 2; correct?

A Benchmark to the adopted, yes.

Q Let's start with the trades between District 4 and District 3. The enacted switched Petersburg from four to three, and that subordinated traditional districting principles to race; correct?

A Yes.

Q And that transfer of Petersburg from District 4 to District 3 was similar to the unconstitutional district in *Moon*; correct?

A Yes.

Q And that's equally true of plaintiffs' alternative; correct?

A Yes.

Q And you criticized the swaps between three and seven; right?

A Yes.

Q And you said that adding New Kent to district seven and transferring high-density black VTDs to

three from Henrico and Richmond subordinated traditional districting principles to race; correct?

A Yes.

Q And all of those criticisms apply equally to plaintiffs' alternative plan; right?

A Yes.

Q If you could turn to tab three. Plaintiffs' Exhibit 29, please.

A Say that again, please. I'm sorry.

Q Tab three, Plaintiffs' Exhibit 29. And if you could turn to page four.

A Yes.

Q This is your expert report in this case analyzing plaintiffs' alternative plan?

A Yes.

Q And this morning you criticized the locality splits in the enacted plan as subordinating traditional districting principles because it had more locality splits in District 3 than any other district in the state; right?

A Yes.

Q And it had nine locality splits; correct?

A Yes.

Q And plaintiffs' alternative has—District 3 has eight locality splits; correct?

A Yes.

Q And that is more than the locality splits of any other district in the state.

A Yes.

Q So that two locality splits in plaintiffs' alternative plan subordinate traditional districting principles to race; correct?

A This is an indicator, yes.

Q And you also claim, and this counts if you look at the VTD splits in your table, that counts VTD splits that affect people and those that don't affect people; correct?

A Correct.

Q Even if you count VTD splits that have no effect on human beings, the alternative plan has 11 VTD splits; correct?

A Correct.

Q And that is more VTD splits than any other district in the state; correct?

A Correct.

Q So the alternative plan subordinates traditional districting principles, the traditional districting principle of preserving VTDs; correct?

A Correct.

Q So the alternative plan subordinates traditional districting principles to race, but unlike the enacted plan, does not further the General Assembly's political goals of having an 8/3 incumbency protection plan; correct?

A Yes.

Q Yes, it does not?

A Yeah. That's why I'm trying to think how to formulate the answer.

Q You agree that the alternative plan does not further the General Assembly's political or incumbency protection goals of having an 8/3 partisan division; correct?

A Yes, with a caveat.

Q Okay. What is the caveat?

A After the basis of looking at the legislative record, we don't have knowledge that the goal was to create an 8/3 split.

Q Assume with me that what you wrote in your Richmond article and what would benefit the General Assembly politically was a desire to have an incumbency protection plan in an eight-to-three partisan division; okay? Assume with me what you wrote in your own University of Richmond article was correct; okay?

A Assuming that's correct.

Q Okay. Assuming what you wrote is correct, it is true, therefore, that plaintiffs' alternative plan does not further the General Assembly's goal of protecting eight Republican incumbents and preserving an eight-to-three partisan division; correct?

A Assuming what I wrote was correct before looking at the entirety of the evidence that we presented in this case, yes.

Q Okay. Now, the reason it doesn't do that is because plaintiffs' alternative plan has a very negative effect on Congressman Rigell's future reelection prospects; correct?

A Potentially, yes.

Q It converts District 2 into a likely—a seat that will likely elect a Democratic, doesn't it?

A It will be more favorable to a Democratic candidate, yes, but he may still win in that district because of incumbency advantages and other things.

Q Let's turn to tab five, Mr. Morgan's report, page 16.

A Yes.

Q Okay, Mr. Morgan says that the alternative plan moves 126,980 people from District 3 to District 2. You agree with that; right?

MR. HAMILTON: Objection, Your Honor. Same objection. We're getting the cart before the horse.

JUDGE PAYNE: Sustained. If he agrees with absolute figures, that's one thing, but stay away from the report.

Q Do you agree with it?

A Can you please restate the question for me.

Q Does the plaintiffs' alternative plan, which you analyzed, move 126,980 people from District 3 to District 2?

A I'd have to look back at my reports to see that.

Q All right, go ahead.

JUDGE PAYNE: Which report do you want in front of you there?

Q Tab three.

A Yes.

JUDGE PAYNE: The answer is yes then?

THE WITNESS: Yes, I'm looking at tab three. Q Did you look at the political composition of the 126,000 people moved from District 3 to District 2?

A I did not.

Q You have no basis for disagreeing with the assertion that 81 percent of the people moved from District 3 to District 2 are Democrats, do you?

A I have no basis for that, yes, disagreement.

Q And did District 2 move 45,798 people to District 3?

JUDGE PAYNE: In the alternate plan?

MR. CARVIN: In the alternative plan.

A I don't know that number offhand. Let me see. It's on maybe page nine? I'm trying to find it for you. I think this is it. But this is from the benchmark, not from the adopted.

Q I'm sorry?

A The statistics that I reported were from the benchmark to the alternative, not the adopted to the alternative. I think that's the question you are asking me.

Q No.

A No, it's not, okay. Can you please restate the question for me.

Q If you don't trust the exact same figures in Mr. Morgan's report, why don't you turn to tab three, page nine, of your report.

A Yes.

Q Okay. And you report, do you not, that the alternative plan moved 45,798 people from benchmark District 2 to District 3; correct?

A Yes.

Q And you didn't analyze the political leanings of those people moved, did you?

A No.

Q Okay. So you have no basis for disagreeing with the assertion that those people are split evenly between Republicans and Democrats?

A No.

Q And you have no basis for disagreeing with the notion then that the alternative plan moves an overwhelmingly Democratic group into District 2 and moves an evenly divided group out of District 2, do you?

A No, I do not.

Q And you don't have any basis for disagreeing with the fact that that move converts District 2 from a 50 percent toss-up district to a heavily Democratic 55 percent noncompetitive district, do you?

A No, I do not.

Q And if all of that were true, then this would be not only—this would be directly undermining the General Assembly's goals of incumbency protection and maximizing Republican congressional representation; correct?

A If those were goals of the General Assembly, yes.

Q So you have no basis for asserting that plaintiffs' alternative serves the legislature's political goals.

A Can you please rephrase the question again or restate it.

Q Let's move on. The alternative plan's changes between three and two can't be explained by enhancing Republican political efforts; correct?

A Between three and two in the alternative plan?

Q Yes.

A No.

Q But the enacted plan's changes between three and two can be explained by enhancing Republican political prospects; correct?

A Partially.

Q And do you know what the changes to District 3 and 2 did to the percentage of people retained in District 3 from the benchmark district?

A As I previously stated, I have not calculated that percentage.

Q So you have no basis for disagreeing with the assertion that the changes, just the changes between two and three in the alternative plan, decreased the core retention of the enacted plan from 83.1 percent to 69 percent, do you?

A I do not.

Q Okay. So this alternative that you are offering up is not an alternative that shows—that does not subordinate traditional districting principles; right?

A It's such a double negative, so I'm just trying to understand the question.

Q This alternative doesn't show what a plan would look like if the line-drawer had adhered to race-neutral traditional districting principles rather than subordinating traditional districting principles to race.

A Did not—yes, it did not, with a caveat.

Q What's the caveat?

A Caveat is, within the Hampton Roads area, we can see that localities are kept nearly intact with the exception of that small split of Portsmouth, so other traditional redistricting principles within the area between the second and third, there is improvement on those traditional redistricting principles.

Q Okay. That's not a caveat. That's nonresponsive. I'm asking you again, is the plaintiffs' alternative reflection of a plan where the line-drawer adheres to race-neutral traditional districting principles?

A To some extent, yes.

Q That would be only in the swaps between two and three.

A Right, yes.

Q And you think that race didn't factor into it in two and three?

A That race did not factor—

Q Even though the avowed goal—

JUDGE PAYNE: Wait a minute. Wait a minute. The first question is off the table, so now you are starting again.

MR. CARVIN: Yes.

Q You told me before that the avowed goal of the line-drawer was to decrease the BVAP from 56.3 to 50.1. Are you contending that race was not a factor in how they drew those lines?

A Race was a factor, yes.

Q Okay. So this is not an example even in this area of where the line-drawer was adhering to race-neutral traditional districting principles. Race was a primary motivation; correct?

A In this region, race is more balanced, so, no.

Q It's a factor in this region.

A It's a factor in this region.

Q And it's a predominant factor in the rest of the plan?

A Yes. It is also a factor in the rest of the plan, yes .

JUDGE PAYNE: But his question was, was it a predominant factor in the rest of the plan, the alternative plan, in your opinion.

THE WITNESS: Yes.

Q So there's no plan in front of the Court that illustrates how traditional districting principles would be honored if race was not a factor or a predominant factor; correct?

JUDGE PAYNE: I don't know if that's a fair question for him to answer. That's sort of argument. Go ahead with something else. Do you have anything else?

Q Well, the alternative plan is not designed to show what a race-neutral plan would look like. It's

designed to show narrow tailoring under Section 5; is that your understanding?

A Yes.

Q And you testified on direct that it's more narrowly tailored because it's just a bare majority, 50.2 percent, where the enacted plan is 56.3 percent.

A Yes.

Q And the compelling government interest here is complying with Section 5 of the Voting Rights Act; right?

A Well, it's no longer operative in Virginia, so...

Q What do you think it's narrowly tailored to?

A A potential Section 2 challenge.

Q Assume with me that the plaintiffs have argued that this is narrowly tailored to comply with Section 5; okay?

A Okay.

Q Do you think this is narrowly tailored to comply with Section 5?

A Yes, I do.

Q Okay. Now, Section 5 says you can't retrogress minorities' ability to elect their candidates of choice compared to the benchmark plan; right?

A Yes.

Q Okay. And this doesn't mean that you need to preserve a 50 percent BVAP; correct?

A Please restate the question.

Q The command of Section 5 is not to reduce the BVAP below the point where minorities are able to

elect their candidate of choice. It is not to stay above 50 percent BVAP; right?

A Correct. There is no magic number, yes.

Q And the truth is, in the south, in modern times, blacks are able to elect their candidates of choice in districts with much less than 50 percent BVAP; correct?

A In some locales, yes.

Q And this is one of those locales; correct?

A I believe so.

Q Okay. And you did a racial bloc voting analysis to analyze this; right?

A Among other things, yes.

Q And that analysis shows that District 3 is an effective district where blacks can elect their candidate of choice with a BVAP in the high 20s or the low 30s; correct?

A That's not in my report, no.

Q Could you turn to your deposition, please. Do you still have that in front of you?

A Yes, I do.

Q If you could turn to 209, please.

A Yes.

Q All right. If you look at the Qs and As at the bottom of 209, with that kind of white crossover, referring to your racial bloc voting analysis, you could take this down to the low 30s and would still provide blacks an opportunity to elect a candidate of choice.

Do you want me to do the math for you?

If you want to do the math, you can do it, but if you represent the math to be true, then I would agree with you.

Question: Okay.

Answer: This is consistent with what I've seen in other jurisdictions in the south; correct?

A Yes.

Q Okay. So the truth is that under your racial bloc voting analysis, and I will do the math with you in a minute, you could elect a candidate of choice even if you decrease the BVAP to the low 30s; correct?

A If you represent that to be true.

Q Let's do the math. If you could turn to tab four.

This is Plaintiffs' Exhibit 30.

A Yes.

Q And if you could turn to page five?

A Yes.

Q And this is the racial bloc voting analysis you did for District 3?

A Yes.

Q And you weren't talking about the enacted District 3, you were contemplating a District 3 with a 51 percent BVAP; right?

A That's not what this analysis is.

Q All right. If you could look at the first column of your chart. Do you see that?

A Yes.

Q Where it says, estimated vote for candidate of choice in 51 percent BVAP district, not analyzing the chances of electing a minority candidate of choice in a 51 percent BVAP district?

A Yes, I am. I'm sorry. I didn't quite understand the question.

Q And basically—let's turn to the results, and then we'll come back and do the math. If you turn to the top of page six, please.

A Yes.

Q Okay. And you say in the third full sentence, do you not, that the baseline support for the minority candidates of choice in a 51 percent black VAP district is in the mid to upper 60s range.

A Correct.

Q Which means that in a 51 percent district, you would expect the black candidate of choice to get up to the high 60s; right?

A Yes.

Q And 55 percent is a safe district, correct, not competitive?

A Generally speaking, we think in terms of—see, you are asking a different question. I have to say no to that answer, and we can—I can explain.

Q When you chose the precincts that you were going to analyze in your race-versus-politics analysis, you chose districts with a 55 percent Democratic performance share; correct?

A Right.

Q That's because you said those were districts that were not competitive but were heavily Democratic; correct?

A Right.

Q Now, here you are saying that the anticipated vote at 51 percent BVAP is from 65 to 69 percent; correct?

A Can you please point to those numbers for me.

Q You say in the sentence I read to you a minute ago, the baseline support for the minority candidate of choice in a 51 percent black district is in the mid to upper 60 percent range; correct?

A Yes, correct.

Q Mid to upper 60s is 65 to 69 percent?

A Yes.

Q 65 to 69 percent is a super safe district; correct?

A Yes.

Q Well above providing blacks an equal opportunity to elect their candidate of choice; right?

A Yes.

Q Now let's do the math. Let's go back to page five; okay?

A Yes.

Q And you looked at the race between President Obama and McCain in 2008; right?

A Correct, yes.

Q And you looked at the governor's race in 2009 involving Mr. Deeds, Senator Deeds, for governor?

A Yes.

Q And that was a white-on-white race, two white candidates?

A Correct.

Q The more probative race is the president's race because it's more probative to look at races involving minority candidates?

A Mixed race candidates—races are usually more probative of value, yes.

Q And your estimated support—this was a standard regression analysis, Goodman's double regression, how we predict vote outcomes in voting rights cases?

A Yes, it's a very standard procedure that's used in voting rights.

Q And the turnout of black voters is roughly the same as the turnout of white voters your analysis shows?

A Roughly, yes, but those statistics are not presented here.

Q Okay, but what we talked about at the deposition, and that was the conclusion you got from these statistics; correct?

A Correct.

Q And your anticipated level of support from black voters for the black preferred candidate is 104.3 percent or 96.1 percent; right?

A Yes.

Q And the real number is somewhere in between roughly 100 percent support, right, of blacks for the black-preferred candidate?

A It's probably closer to 96 percent. The numbers start tailing off just as you get up to 100 percent, so there was no precinct that had 100 percent support even though it was near 100 percent minority district.

Q Let's assume, therefore, he had a 25 percent BVAP district. If he got 98, 96 percent of the black vote, that means the black candidate of choice would start with 24 percent of the vote; right?

A Thereabouts, yes.

Q Okay. And then 75 percent of the voters are non-black; correct?

A Correct.

Q Okay. And the support you expect from non-black voters for the black candidate of choice is between 38.6 percent and 43.6 percent; right?

A Oh, yes.

Q And 40 percent of 75 is 30 percent; correct?

A 40 percent of 35, yes. 40 percent of 35.

Q 40 percent of 75 is 30 percent; correct? Two times 15 equals 35, times 15 equals 75. Two-fifths is 40 percent.

MR. HAMILTON: Object to the form of the question.

Q Do you know what 40 percent of 75—

A If you could just give me a second.

Q Sure, take your time. I can give you a calculator.

A That would be great. I'm trying to keep a number of numbers in my head at the same time.

JUDGE PAYNE: Mr. Carvin, you are on cross-examination, so you've been given a good bit of latitude, but we seem to be going far off the bases here. Maybe you want to tether, get back to the base a little bit.

MR. CARVIN: Okay.

A 30, yes.

Q Okay. So if you add the 30 percent from the non-black 75 to the 24 percent from the 25 percent BVAP, that adds up to 54 percent; correct?

A Yes.

Q So this analysis would support the notion that surely at 30 percent, blacks in District 3 would be able to elect their candidate of choice at 30 percent BVAP.

A Likely we would want—this analysis alone, yes.

Q And you said this morning that there was no basis—well, in fact, in this, you say, do you not, at the end, that given this racial bloc voting analysis, there's no basis for increasing the black BVAP above 51 percent; right? If you want to turn to page 12, that will be fine.

A I'm on page 12.

Q I'll just ask you the simple question. Is it your opinion that in District 3, a 50 percent BVAP is the lowest BVAP needed for blacks to elect their candidate of choice?

A That 50 percent is the lowest BVAP needed. A 50 percent district would be performing for an African-American candidate, so, yes.

Q 44 percent district would also—

JUDGE PAYNE: I don't think that was the question. Ask the question again. Listen to the question and answer the question he was asking, because you changed the question in your answer without intending to, I'm sure .

THE WITNESS: I'm sorry, Your Honor. I'm really trying to answer the question. I apologize.

JUDGE PAYNE: I said that. You have a hard job. Go again.

Q Based on your analysis, is 50 percent the lowest BVAP required to provide black voters with an opportunity to elect their candidate of choice?

A No.

Q You could have a substantially lower BVAP?

A Yes.

JUDGE PAYNE: You are talking about in District 3.

MR. CARVIN: District 3.

THE WITNESS: Yes.

Q So, therefore, 50 percent is not tied to the BVAP needed to avoid retrogression, it is well above that point; correct?

A Correct.

Q Now, Virginia, as you point out, did not do a racial bloc voting analysis of the kind you did here, right, as far as you know?

A Yes.

Q And if you haven't done a racial bloc voting analysis, the best course, like what the bipartisan

commission you served on, is simply to not go below the benchmark BVAP; correct?

A Best course, we had—

MR. HAMILTON: Your Honor, I object to the form of the question, and I'm not sure if it's a legal question, the best course, in which case it's inappropriate for that reason. I'm not sure of the measuring stick the witness is supposed to answer that question with.

JUDGE PAYNE: So what do you say about the objection to the form of the question, Mr. Carvin?

MR. CARVIN: I'm asking him whether or not it makes sense if you haven't done a racial bloc voting analysis, isn't the best course to not go below the BVAP like the bipartisan commission upon which you served.

MR. HAMILTON: Same objection, Your Honor. I don't know how the witness is supposed to answer the question.

JUDGE PAYNE: Best course for what purpose, I suppose, is what his objection is, Mr. Carvin, and I think he's right.

MR. CARVIN: That's fair enough.

Q You're trying to secure preclearance from the Justice Department where you need to prove non-retrogression. If you haven't done a racial bloc voting analysis, the best and safest way of achieving preclearance is not to go below the BVAP, correct, the benchmark BVAP?

A No.

Q No? The commission upon which you served.

A Yes.

Q And where you advised them—

A I was a consultant. I didn't serve on it.

Q Where you consulted them on how to draw it, they made the decision about which you did not object to make sure they didn't go below the benchmark BVAP; correct?

A Incorrect.

Q Is that incorrect?

A Incorrect.

Q They decided they could go below it; correct?

A Correct.

Q This is not in your folder. Do you still have the Intervenor's Exhibit 45?

JUDGE PAYNE: It's a book -

MR. CARVIN: This is not, unfortunately, Mr. McDonald's book, but I'd like him to turn to Intervenor's Exhibit 45.

JUDGE PAYNE: Do you have that, Dr. McDonald, that book? Is that an email that you are talking about?

MR. CARVIN: Yeah.

JUDGE PAYNE: Do you have that, Dr. McDonald?

THE WITNESS: Yes.

Q This is an email from you to the people that were drawing the congressional districts under your supervision; correct?

A Correct.

Q In your connection as a consultant for the commission; correct?

A Correct.

Q Okay. And the first line of your email is, "I've shared a congressional plan called Dr. McDonald Third District variant which demonstrates how to create a plan that has a Third Congressional District more than 53.2 percent plus black VAP and connects the Eastern Shore with a bridge in the Newport News area. Did you write that?

A Yes.

Q And then the next sentence is, "These are two absolutely must requirements," and the word "must" is all caps; correct?

A Yes.

Q "For the plan to be considered by the commission. A 53.2 percent plus black VAP district," and then another consideration.

So, Dr. McDonald, isn't it a fact that the commission did not want a BVAP below the benchmark BVAP? Wasn't that a must?

A No.

Q Can you explain to me why you told these people in your email eight days before the commission came out with its plans why a 53.2 percent black VBAP [sic] was a must when, in fact, it was not a must?

A If you turn fortunately to the next exhibit, Intervenor Defendants' Exhibit 46, there's—at the bottom of that page, there's, under the Section 2, maps must be—maps drawn must ensure compliance with the federal Voting Rights Act. The last bullet

point there, it says that the BVAP shall not be below 50.5 percent.

Q Now I need Plaintiffs' Exhibit 46. And that's Tuesday, March 22nd, 2011?

A Correct.

Q Right?

A Correct.

Q And the next email, is it March 23rd, 2011?

A Correct.

Q I'm going to ask you again, why did you say on March 23rd, 2011, that it was a must not to be below the BVAP if that was not the commission's position?

A This is to draw a single district, and I cannot recall the circumstances that led to this email. I assume that it had some conversation that I had with commissioners that I was relaying on to the map-drawers for the congressional district.

Q Well, you don't say for this particular district, do you? You say there are two absolutely must requirements for the plan to be considered by the commission; correct?

A I say—

Q Doesn't that convey to the reader that is a requirement for a plan to be considered by the commission?

A I say how to create a plan, not all plans.

Q No, you say a plan to be considered, don't you?

A For a plan to be considered.

Q Right. And—all right. Did they ever produce any plans that have 50.5 percent BVAP on them?

A I believe they did.

Q You do?

A Yes.

Q We'll come back to that. I want you to remember that.

You think they came out publicly with a plan that recommended a 50.5 percent BVAP; is that correct?

A I thought you said 55 percent.

JUDGE PAYNE: 50.5.

Q 50.5.

A 50.5. I do not believe that they did.

Q They did, okay.

A Did not.

Q And, in fact, the two plans that you had anything to do with were 55 percent BVAP and 53-point-something BVAP; correct?

A I believe so.

Q Let's turn to your deposition at page 227. Were you asked this question and did you give this answer: "So I understand, it makes sense that you wouldn't want to decrease BVAP below the benchmark if you haven't done a racial bloc voting analysis because you couldn't prove to the Justice Department that it didn't diminish the ability to elect; correct?

"Answer: Correct."

Were you asked that question and did you give that answer?

A Yes.

Q And, again, the General Assembly had not done a racial bloc voting analysis; correct?

A Correct.

JUDGE PAYNE: Excuse me, Mr. Carvin. You referred to Exhibit 46 in the interveners in one of your answers. It's a memorandum from Holsworth to you dated March 22.

THE WITNESS: Correct.

JUDGE PAYNE: The earlier memo that you sent, Exhibit 45, is that a reply to or comment on what Holsworth said in his memo?

THE WITNESS: I don't remember the circumstances that led to that email.

JUDGE PAYNE: All right.

THE WITNESS: So I can't answer that question for you. I'm sorry.

JUDGE PAYNE: Excuse me.

Q And you contend that by going to 56.3, that that packs blacks into District 3?

A I've never used the word pack.

Q Oh, your counsel used it. So you don't think District 3 is packed?

A I believe it's above what was necessary to elect a candidate of choice.

JUDGE PAYNE: The question was, do you believe District 3 is packed.

THE WITNESS: We have to define what the term packed means.

Q Do you think it's packed under any definition?

JUDGE PAYNE: Why don't you just ask him what his definition is. What do you understand packed to mean, Dr. McDonald? That's used in the vernacular. What do you understand it to mean?

THE WITNESS: Well, in the voting rights litigation in Section 2, it means to create a district such that there's so much African-American population within that district that you could have created a second district, but you are unable to do so because so much of the African-American population was placed within that district.

JUDGE PAYNE: That's what you understand the term packed when a lawyer asks about it to mean?

THE WITNESS: Yes.

JUDGE PAYNE: Now, with that understanding, do you have a question, Mr. Carvin?

Q Do you think District 3 is packed?

A No.

Q But you nonetheless criticized them for having 56.3 percent in there; right?

JUDGE PAYNE: I think we've got that point there, Mr. Carvin. We have been paying attention.

Q Well, I just want to go back to you discussed the criteria that the Justice Department examined when they are pre-clearing plans; correct?

A Correct.

Q If you could turn to tab 24 in your book, please.

JUDGE PAYNE: That's in the witness book that you gave him.

MR. CARVIN: Yes, back to the witness book now.

JUDGE PAYNE: That would be exhibit what? Tab 24. Is that the federal register? It's a plaintiffs' exhibit somewhere because he referred to it earlier.

MR. CARVIN: I'm afraid I don't have the exhibit number. It's actually Defendants' Exhibit 9, Your Honor.

JUDGE PAYNE: Defendants' Exhibit 9, okay.

Q If you could turn to page 7472 of this, please.

A Yes.

Q Okay. The very top left-hand corner, it's describing the factors that the Justice Department will assess in granting preclearance under Section 5; correct?

A Yes.

Q One of the factors they looked at is whether minorities are overconcentrated in one or more districts; correct?

A Correct.

Q And the enacted plan was pre-cleared?

A It was.

Q And then the other, some of the other factors it looks at is whether the district ignores other relevant factors such as compactness and contiguity?

A Yes.

Q Is that another factor they looked at? And whether the proposed plan departs from objective redistricting criteria, that's another factor they look at?

A Skipping around, yes.

Q And one of the reasons that you think that a district with a 50.5 or 50.49 percent BVAP could have been pre-cleared is because that was the BVAP that—of the plan that was pre-cleared in 1998 to replace the *Moon* district?

A That's one piece of evidence, yes.

Q If you could turn to page 7470.

A Yes.

Q The plan that was pre-cleared in 1998 came in the wake of a plan that was struck down under *Shaw v. Reno*; correct?

The *Moon*—

A I'm just trying to remember the Shaw line of cases. I guess.

Q It was struck down as a racial gerrymander under the 14th Amendment; correct?

A Yes.

Q And you know, therefore, that that plan could not have served as the benchmark for retrogression for the 50.5 plan introduced; correct?

A Correct.

Q Okay. And in the 1980s, that—the last legally enforceable plan would have been the benchmark; correct?

JUDGE PAYNE: In 1998, the most—the benchmark plan would have to have been a plan in the 1980s; is that your—

MR. CARVIN: Yes.

Q Is that correct?

A I am not sure what the Department of Justice would do in that case.

Q Turn to page 7470, tab 24, please.

A Yes, I'm there.

Q Lower right-hand corner, second, the last full paragraph. the Justice Department says, does it not, that a plan found to be unconstitutional by federal court under the principles of *Shaw v. Reno* and its progeny cannot serve as the Section 5 benchmark, citing *Abrams v. Johnson*, and in such circumstances, the benchmark for Section 5 purposes will be the last legally enforceable plan predating the constitutional plan; correct?

A Unconstitutional plan, but, yes.

Q Unconstitutional plan. And in this case, the last legally enforceable plan was the redistricting plan established by the legislature in the 1980s; correct?

A I believe so.

Q That plan did not have any majority black districts in it, did it?

A I don't know the answer to that question.

Q You've read *Moon*. Don't you know that this was the first time they had created it in the 1990s?

A Again, I have read it, but I'd have to refresh my memory.

Q All right. If there were no majority black districts in the 1980s redistricting plan, then 55.5 percent BVAP would be a higher BVAP than the benchmark districts; correct?

A 55.5? Yes.

Q 50.5?

A You said 55. I'm pretty sure I heard that. 50.5, yes .

Q Okay. So the fact that it was pre-cleared in 1998 when it was compared to a majority white district doesn't indicate in any way that decreasing it from 53.1 to 50.5 would also be pre-cleared by the Justice Department; right?

A The Department of Justice—no. I'll just answer the question. No. I mean, I'm—let me make sure—please ask the question again so I make sure I answer it correctly.

Q All right. Now, the increase from 53.1 to 56.3 you view as unnecessary; correct?

A I don't believe I answered that last question correctly.

Q Okay. Do you think there's anything problematic about going from 53.1 to 56.3?

A The question preceding that I don't think I answered correctly.

JUDGE PAYNE: You were talking—I think you already said that you didn't think you answered it correctly, and he was starting all over again to ask the question again.

THE WITNESS: It was the previous question.

JUDGE O'GRADY: He missed two questions. Do you withdraw that question, Mr. Carvin?

Q I didn't realize you were going back two questions, but I'll reask it. The fact that the *Moon*, the post-*Moon* plan at 55 percent BVAP was pre-

cleared doesn't tell you very much, because the benchmark was well below 50.5 percent; correct?

A I'm having trouble parsing that sentence, so—

Q Do you want to try again?

A Yes.

Q There was no black district serving as the benchmark for the 1998 preclearance that was in excess of 50.5; correct?

JUDGE PAYNE: There wasn't any black district at all.

MR. CARVIN: Thank you.

JUDGE PAYNE: What difference—it's all speculative, isn't it?

Q The fact that they pre-cleared a plan that was 50.5 percent and higher than any prior district doesn't tell you they would have pre-cleared a plan at 50.5 percent if you were decreasing the BVAP from 53.1 percent; correct?

A I assume that the Department of Justice would have, and perhaps—I've not seen the Section 5 submission from the Commonwealth of Virginia. There may have been a racial bloc voting analysis there. The Department of Justice may have done a racial bloc voting analysis to determine whether or not that district would have been performing at 50.5 percent. I assume that they did, because it was submitted for consideration.

Q But the benchmark in 1998 was not higher than 50.5 percent BVAP; correct?

A Correct.

JUDGE PAYNE: Can we move on?

Q And the benchmark this time would be higher; correct?

JUDGE PAYNE: I think we understand the point. Go ahead. Anything else that you've got?

Q I was just wondering—does that clarify your prior answer? I thought that's why we went through it all again.

A Yes. My clarification is they may have done a racial bloc voting analysis to determine.

Q Do you have any reason to believe that the increase from 53.1 to 56.3 itself subordinated traditional districting principles more than a 53.1 percent BVAP district would have?

A Again, can you please restate the question? You've thrown three numbers at me.

Q Do you have any concerns that the increase from 53.1 to 56.3 resulted in subordination of the traditional districting principles?

A The numbers in and of themselves are not necessarily indicative of that.

MR. CARVIN: Your Honor, I don't know what your plans are. I do have a bit more. What I'd like to do is do some triage on it, and if this would be a convenient time for a break—

JUDGE PAYNE: We're going to need to switch court reporters anyway, so I think triage is appropriate. How much longer do you think you have?

MR. CARVIN: I didn't expect this to take as long. If we can have questions and answers, I should be done in 30 minutes, 40 minutes.

JUDGE PAYNE: 30 more?

MR. CARVIN: 30 more.

JUDGE PAYNE: We'll see. All right. We'll take a recess.

(Recess taken.)

JUDGE PAYNE: Mr. Carvin, when we set the schedule you were going to have two to three hours of cross-examination and you have kind of gone beyond that. So maybe 15 to 20 minutes, wrap it up. All right?

MR. CARVIN: I'll try to move as fast as I can.

BY MR. CARVIN:

Q Dr. McDonald, I'd like to look at the options of the commission you served on proposed. That's at Tab 8, Intervenor-Defendants' Exhibit 28.

A I'm on Tab 8. Which page is it on?

Q Yes. If you could turn to page 24.

A Yes.

JUDGE PAYNE: What's the exhibit?

THE CLERK: Tab eight, Intervenor Exhibit 28.

JUDGE PAYNE: Tab 8. Okay.

A Yes, I'm there.

Q Okay. The first proposal is called, "Third District Option 1"?

A Yes.

Q And the proposed BVAP in that is 53.6 percent; is that correct, down in the lower left-hand corner?

A Yes.

JUDGE PAYNE: What page are you on?

MR. CARVIN: Page 24.

JUDGE PAYNE: All right. Thank you.

Q And that's higher than the benchmark BVAP?

A It is.

Q And that has 41 county and city jurisdictional splits?

A Yes.

Q That's four more than the Enacted Plan?

A Yes. The model plan is the current, yes.

Q And—

A I'm sorry to interrupt you. The current plan has 47. So it was six less.

Q The current plan is the Benchmark Plan?

A Yes.

Q The Enacted Plan reduced the splits from 47 to 37, correct?

A Thank you for providing that number. Yes.

Q So the commission's proposal had four more jurisdictional splits than the one enacted by the General Assembly?

A Yes.

Q Congressional District Option 2, the BVAP is 55.1 percent; correct? That's on page 25 in the lower left-hand corner.

A Yes.

Q Okay. And that's also above the BVAP by roughly 2 percent for the benchmark?

A Yes.

Q And that has 38 county and jurisdictional splits?

A Yes.

Q That's one more than the General Assembly's?

A Yes.

Q And I'm not even going to discuss option 3 because that's something you had nothing to do with. That was some kind of political deal involving congressmen that came in at the last minute.

A I didn't have anything to do with any of these points.

JUDGE PAYNE: He's not asking you anything about it.

THE WITNESS: Well, he's asking a compound question.

JUDGE PAYNE: I know, but he wasn't going to ask about it. So if he's not going to ask about it, don't answer.

THE WITNESS: Okay.

Q Then if you could just turn to—skip that. Just in terms of the relative compactness scores between the Enacted Plan and plaintiffs' Alternative. You can take your eyes off the commission plan. I'm now asking you a question about the relative compactness scores of the Alternative Plan and the—I'm sorry.

The plaintiffs' Alternative Plan and the General Assembly's plan, right?

A Okay. Yes.

Q Those differences are relatively smaller, are they not, the compactness scores?

A The differences in the compactness scores, yes, they are relatively small.

Q And they're not significant under any professional standard, correct?

A Correct.

Q There's no minimum score for compactness?

A Unless the jurisdiction wishes to, but not in this situation.

Q And all of these compactness scores are inherently manipulable ?

A Yes.

Q Because of this, as you point out, courts generally just measure compactness through visual inspection, right?

A Yes.

Q And there's no professional standard that says the three measures you use are better or more reliable than other measures such as the ones used by Mr. Morgan?

A Correct.

Q Preserving VTDs is not a traditional districting principle, correct?

A Preserving VTDs is not—it can be.

Q Turn to your deposition at page 36, please.

A Page 36?

Q Yes. Do you see it in front of you?

A Yes, I'm there.

Q Question: And other than municipal and county boundaries, is it traditional to preserve precinct lines?

Answer: It's not a traditional districting principle; however, I see a reasonable election administrative goal to preserve those boundaries. Some states don't do it at all. Some states do.

Were you asked that question and did you give that answer?

MR. HAMILTON: Your Honor, I object to the reading of a partial answer. I think the record should reflect the entire answer given in the deposition.

MR. CARVIN: Actually, that's helpful. I was trying to save time, but it's actually better.

BY MR. CARVIN:

Q So it's more of an issue for an individual state whether or not they're going to respect local precinct boundaries. Some states are very explicit about having to draw all these precincts, the districts out of those precincts. It's either in the state code or the state Constitution.

JUDGE PAYNE: That completes the question?

Q We asked that question. Did you give that answer?

A Yes.

Q There's nothing in the Virginia State Code or State Constitution about preserving VTDs?

A That's correct.

Q When you were analyzing the various aspects of the options for the commission, you didn't even look at the extent to which they split VTDs, correct?

A That's correct.

Q Surely, if—the VTDs are voting tabulation districts, right?

A Correct.

Q So as a general matter, if it doesn't affect voters, if it doesn't affect population, then splitting the VTD is of no consequence as a general matter?

A Please restate that question for me.

Q A VTD is a voting tabulation district, correct?

A Correct.

Q So it's purpose is to tabulate votes. So if it doesn't affect voters, if it doesn't affect people, as a general matter it's of no consequence, a VTD split?

A No, I do not agree with that.

Q You think if you split a VTD, but it doesn't affect a voter, that it somehow is contrary to traditional districting principles?

A It can be it. It can be an indication—

Q I'm going to ask you again. As a general matter, it doesn't matter if you split a VTD when no population is affected, correct?

A I'm going to disagree with that, no.

Q Why would it matter?

A Again, as I've testified previously, VTDs were being split in order to bypass racial communities.

Q If VTDs are not being split to bypass racial communities, as in this case, as a general matter splitting the VTD, if it doesn't affect population, it's of no consequence, right?

A They can affect—because VTDs are—no. I'll directly answer the question no.

Q And the VTDs—may I approach? The VTDs that were split here are out in the James River and places like that, right?

A Right, yes.

Q And so what bothers you is not that the fish in the river were affected, but what bothers you is that they were going from here to here through the water and in the process splitting the VTDs. That's your concern, right?

A Right, yes.

Q That's also your concern for water contiguity, that they were bypassing the community to unite those two districts, right?

A Yes.

Q But water contiguity without a connector such as a bridge is also permissible in Virginia, correct?

A It is.

Q Okay. And it's not Impermissible to consider race in redistricting under *Shaw*, correct?

A Yes.

Q It's only Impermissible if you subordinate traditional districting principles?

JUDGE PAYNE: Mr. Carvin, come on. That's all law. We don't need him to testify about whether it's permissible or not under the case law.

BY MR. CARVIN:

Q All I'm trying to get at is it's not to split VTDs or the contiguity, it's the fact that they considered race in going around it, right?

JUDGE PAYNE: You mean, is that his opinion? I think he said that about three times. Let's go on. You've asked that question two or three times.

MR. CARVIN: Okay.

BY MR. CARVIN:

Q Now, we also talked about how the Alternative Plan has one fewer political boundary split than the Enacted Plan. One fewer locality split.

A Yes.

Q If the General Assembly preferring cores over—and incumbency protection over boundary splits, then they might well choose the Enacted Plan over the Alternative Plan?

A Can you give me that list again? Cores over—

Q The Enacted Plan, I think we've agreed, is better in terms of preserving cores and incumbency protection than the Alternative Plan. And if the General Assembly thought those traditional districting principles are more important than political boundaries, then it might well be reasonable for them to choose the Enacted Plan over the Alternative Plan, correct?

A If those were the only criteria, yes.

Q Because the choice between preserving cores and incumbency protection, there's no principle that says political boundaries are more important than that, right?

A Correct.

Q And we could go into this if you want in detail, but the Senate redistricting criteria enacted by the Democratic Senate don't suggest that preserving

jurisdictional boundaries are more important than preserving cores or incumbency protection, right?

A Correct.

Q And you gave testimony in a case called *Backus against South Carolina*?

A Yes, I did.

Q And you were testifying for Democratic plaintiffs who were bringing *Shaw* claims against South Carolina State, House, and congressional plans?

A I did.

Q And those plans had been enacted by a Republican-controlled legislature?

A They were.

Q In that analysis, what you did was you analyzed the swaps between districts and saw whether or not they tended to increase BVAP?

A Yes.

Q And you said that the BVAP was higher than was needed to elect black candidates of choice?

A Yes.

Q And you criticized the bizarre shapes of the districts?

A Yes.

Q And the Court in that case rejected your testimony, did it not?

A Yes.

Q It said that you relied on incomplete information?

A Correct, yes.

Q And that you neglected important redistricting principles such as incumbency protection, correct?

MR. HAMILTON: Objection, Your Honor. I'm not sure we're going to litigate the South Carolina case all over again.

JUDGE PAYNE: Sustained.

BY MR. CARVIN:

Q Do you think that criticism was warranted and have you altered your testimony in this case—

JUDGE PAYNE: You mean, has he altered his testimony in this case because of the criticism of the Court? Is that the question?

MR. CARVIN: Yes.

Q Have you changed your approach to analyzing these cases in the wake of the three-judge court's criticism in *Backus* to the approach you took?

A There were substantially different facts that were involved in this litigation, so I did not analyze a completely similar set of criteria between the two, and I'd have to go back to my expert reports in that case to look at it, but I know a couple jump out at me immediately. For example, the water contiguity issue is something I did not raise in South Carolina, and I'd have to look through the reports to see what other—

JUDGE PAYNE: All right, Mr. Carvin.

MR. CARVIN: No further questions. Thank you.

JUDGE PAYNE: Okay. Redirect.

Mr. Hamilton, you're not going to use the redirect technique of repeating everything that was said on cross and everything that was said on direct, are you?

MR. HAMILTON: I'm certainly going to try not to, Your Honor.

JUDGE PAYNE: You're always trying to do something. Let's get it done. Okay.

REDIRECT EXAMINATION BY MR. HAMILTON:

Q All right. Dr. McDonald, you were asked a series of questions about your Law Review article. Do you recall that?

A Yes.

Q We're not going to go through the details of the Law Review article, but at the time you wrote that Law Review article, had you looked at the legislative history?

A Partially.

Q Had you looked at the—had you conducted a racial bloc voting analysis?

A No.

Q Had you analyzed the voting tabulation district splits or the population trades or any of the other analyses that you've done in this case?

A No.

Q Which is your better informed judgment about what was going on with the Virginia redistricting, that Law Review article or the reports you prepared for this court?

A The extensive reports I prepared for this litigation.

Q Okay. Changing subjects. Mr. Carvin asked you about the bipartisan commission that you had participated in. You were a consultant. You weren't on the commission; is that right?

A That's correct.

Q Again, in connection with that bipartisan commission, did you do any of the research that we just went through that you've done in this case?

A I have not. I did not.

Q Why not?

A The commission had no resources and little time to complete its task.

Q Mr. Carvin asked you a few questions about the population swaps between CD 3 and CD 2. Do you recall that testimony?

A Yes.

Q And I think he said something like, So it had a clear political effect and it had a clear racial effect. Do you recall those questions?

A I do.

Q In your analysis in your reports, did you try and tease out which was the predominant factor between politics and race?

A I did.

Q Is that the whole point in your report?

A Yes.

Q I won't ask you to tell us what your conclusion is because I'm confident the Court can remember it. Mr. Carvin discussed—spent some considerable amount of time talking about the potential political impact of some of these swaps. Do you recall that testimony?

A Yes.

Q I think he asked you something like: So if all these voters were white, would politics explain this all? You do you recall that?

A Yes.

Q Were all these voters white, sir?

A No.

Q Is politics, at least in your understanding of the Voting Rights Act and jurisprudence under Section 5, a compelling state interest?

JUDGE PAYNE: Isn't that a legal question?

MR. HAMILTON: It is, sir, and I recognized that as I was saying it. So I'll withdraw the question.

Q Mr. Carvin asked you a number of questions about the alternative map and whether it replicated various errors that you've identified in your various reports. Do you recall that?

A Yes.

Q Why is that?

A Can you elaborate the question?

Q Why is it that it replicates some of the problems with the population swaps and with respect to other congressional districts other than CD 2 and CD 3?

MR. CARVIN: I have to object. I don't know what the foundation would be for him to tell you why the plan did X and Y.

JUDGE PAYNE: Your response?

MR. HAMILTON: Well, Your Honor, I think the answer is—

JUDGE PAYNE: His objection, I guess, is relevance.

Is that what your objection is?

MR. CARVIN: And foundation.

JUDGE PAYNE: And foundation.

MR. CARVIN: To the extent I understand the question, he's asking why the plan looks different, and I don't know that he's laid a foundation.

JUDGE PAYNE: His objection is foundation.

MR. HAMILTON: I think I can solve the problem by just rephrasing the question if I might.

BY MR. HAMILTON:

Q The Alternative Plan—how did the Alternative Plan and the Enacted Plan compare outside of the portions that we see here on the map?

A They are exactly the same.

Q And do you know why it was drawn like that?

MR. CARVIN: Same objection.

MR. HAMILTON: It's a yes or no question, Your Honor, asking for the foundation: Do you know why.

JUDGE PAYNE: Overruled.

A Yes.

Q Why is that?

A To make minimal changes—

JUDGE PAYNE: You have to know how he found out. You can't say, "Do you know" and get it in. You have to lay the foundation, which I thought you were going to do with the next question.

BY MR. HAMILTON:

Q How do you know that, sir?

A I know that through the conversation that I had with the map drawer.

Q Who was that?

A Eric Hawkins.

Q Where is he employed?

A NCEC, National Committee for an Effective Congress.

Q So based on that foundation, why was the map drawn that way?

A The intent, as I understood it, was to only make changes between District 2 and District 3 such that there would be minimal disruption to elections in other districts.

Q I'd like to direct your attention to Intervenor-Defendants' Exhibits 45 and 46. I think they are in the book that Mr. Carvin prepared for us. No, they're not.

JUDGE PAYNE: They are in the intervenor defendants' book.

MR. HAMILTON: That's right.

THE WITNESS: Which number?

Q Let's start with 46. Intervenor-Defendants' Exhibit 46.

A Yes.

Q This was the email that was briefly discussed. Who is this email from?

A Myself.

Q No. I'm looking at Exhibit 46.

A Oh, I'm sorry. I'm one exhibit behind. Yes.

Q Who is this from?

A This is from the chairman of the commission.

Q What's his name?

A Bob Halsworth.

Q And he was chairman of the commission?

A Yes.

Q Why was he writing you this email, if you know?

A He was sending me the criteria that the commission was going to proceed with and was asking for any input that I might *have* on those criteria.

Q Okay. If you'll look down a couple of pages, we *have* this email that goes on one, two, three pages, and then on the fourth page of the document, and for the record, down at the bottom it says, McDonald 000905. There seems to be a different document attached here. What is this?

A This appears to be the, these criteria, perhaps what was going to be relayed to the public from the commission.

Q So the purpose of the chairman's email to you was to identify the principles that the commission was going to be applying?

A Yes.

Q And it says here in this preamble section on page 906 under section heading 2, do you see that section, if I could direct your attention to it?

A Section 2, yes.

Q What does it say there?

A Two sections of the Voting Rights Act are—

JUDGE PAYNE: We can read it.

Q Okay. The second paragraph refers to Section 2. Do you see that?

A Correct.

Q And the third paragraph reference to Section 5?

A Correct.

Q What applicability does Section 2 *have* to Virginia?

A It states that—well, Section 2 is that under certain circumstances, you must draw a minority district, an opportunity district.

Q A majority-minority district meaning a BVAP of 50 percent or higher?

A Right. Some *have* interpreted the Bartlett decision to say that it must be a majority district.

JUDGE PAYNE: We don' t have a Section 2 issue in this case, do we?

MR. HAMILTON: No, we don't, Your Honor.

JUDGE PAYNE: Why are we getting into this?

MR. HAMILTON: Because it's relevant to the question of—Mr. Carvin asked why he didn't draw a map that goes below 50 percent BVAP. And I'm trying to get that answer.

JUDGE PAYNE: All right.

MR. HAMILTON: I think I've made the point.

BY MR. HAMILTON:

Q If you could turn to Tab 46, Exhibit 46, Intervenor-Defendants' Exhibit 45, the preceding exhibit.

A Yes.

Q This is the email Mr. Carvin asked you about?

A Yes.

Q And it mentions 53.2 percent black BVAP. Now, Mr. Carvin kind of skipped by the other thing that you were talking about. What is that other factor?

A Connection of land by bridges.

Q What is that? Can you explain what that means?

A Well, the governor when he made his charge to the commission said that we must connect districts if they were going to cross water with bridges.

Q The governor said that?

A The governor, yes.

Q Did the Enacted Plan do that?

A It did not.

Q Just a couple more questions here.

Mr. Carvin asked you some questions. He actually read some portions of your deposition testimony into the record about increasing or about—let me find it. Page 227, line 5.

A Can you give me that page number again?

Q 227, line 5.

A Yes.

Q Just so that we're all on the same page, the question was: "So I understand, it makes sense that

you wouldn't want to decrease BVAP below the benchmark if you haven't done a racial bloc voting analysis because you couldn't prove to the Justice Department"—

JUDGE PAYNE: You've gotten too fast there for all of us.

MR. HAMILTON: Sorry. I'll slow down.

Q "So I understand, it makes sense that you wouldn't want to decrease BVAP below the benchmark if you haven't done racial bloc voting analysis because you couldn't prove to the Justice Department that it didn't diminish the ability to elect, correct?"

And your answer was, "Correct."

A Correct.

Q Did I read that correctly?

A Yes.

Q Okay. So did Mr. Carvin ask you about increasing the BVAP in that situation?

A No.

Q Would you know without doing a racial bloc voting analysis whether increasing the BVAP is necessary to prevent retrogression?

A No.

Q Would you know whether holding BVAP steady would be sufficient to prevent retrogression without doing a racial bloc voting analysis?

A No.

Q How about if you dropped it a percentage point?

Would you know that without doing a racial bloc voting analysis?

A No.

Q Just before Mr. Carvin finished, we were looking at the proposed—the plans that were various plans that were proposed by the bipartisan commission. Do you recall that?

A Yes.

Q We skipped one.

A Yes.

Q This is Intervenor-Defendants' Exhibit 28. Could you turn to that exhibit, please?

A Yes.

Q We didn't talk about option 3. What was the black voting-age population for option 3 as proposed by the independent bipartisan commission?

A 52.5 percent.

Q Is that higher or lower than the benchmark BVAP?

A Lower.

Q All right. Last subject. Compactness scores.

Mr. Carvin asked you a couple of questions about whether the compactness score differences were relatively small or whether they were significant or not under any professional standard. Do you want that question?

A Yes.

Q Is there a professional standard for compactness?

A There is not.

Q Okay. So we can't say it's insignificant or it's significant because there's no standard to measure it against?

A Right. It's an expert judgment.

Q Then he asked you about the different measures of compactness that you used. And apparently there are a number of others; is that right?

A Correct. They were also in the Commonwealth's Section 5 submission.

Q That's my question. Which of these measures of all the ones that are out in the world did Commonwealth of Virginia use in submitting its Section 5 submission to the Department of Justice?

A The three that I used.

Q Is that why you used them?

A Yes. I thought we would have no disagreement.

MR. HAMILTON: No further questions, Your Honor.

JUDGE PAYNE: All right. Ready to start with your witnesses, please.

MR. CARVIN: May I just ask two questions?

JUDGE PAYNE: Oh, are you playing California rules?

MR. CARVIN: Well, I was going to ask you if I can.

JUDGE PAYNE: Let's see if you can do it with two if they're new. If the first one isn't something new, just turn around and sit down.

MR. CARVIN: I do just want to straighten out this issue about what the commission's position was on decreasing BVAP.

RECROSS EXAMINATION

BY MR. CARVIN:

Q You have referenced Intervenor-Defendants' Exhibit 46. If you could turn to it. Does it not say at the bottom, To be safe, the commission directed those drawing the plans on behalf of the commission to try not to draw any plans with less percentage BVAP than the percentage that was precleared during the 2000 redistricting cycle.

Is that what the first bullet says?

A Yes.

Q And the second bullet that references the 50.5 percent is preceded with this sentence, is it not? The exception to this direction is that those drawing plans on behalf of the commission may draw up plans that would increase by one district the number of majority-minority districts and in such cases may decrease the percentage BVAP of the current number of majority districts to 50.5 percent. So it's only if you're adding a majority-minority district that you can decrease the BVAP to 50.5 percent. Isn't that true?

MR. HAMILTON: Object to the form of the question, Your Honor. He's reading the sentence incompletely.

JUDGE PAYNE: Sustained. And it' s more than two questions. So that's it.

You have a right of redirect as to what he asked. Do you want to use it?

MR. HAMILTON: No, Your Honor.

JUDGE PAYNE: Thank you. We'll have the defendants' witnesses.

(The witness was excused from the witness stand.)

MR. CARVIN: Your Honor, for the record, we'd like to move for a directed verdict at this time and judgment as a matter of law.

JUDGE PAYNE: All right. We'll take that under advisement.

MR. MELIS: Your Honor, just so the record is clear, the state joins in that motion.

JUDGE PAYNE: We'll take the same course with yours.

All right. Who are we calling?

MR. GORE: Your Honor, we call John Morgan.

Good afternoon, Your Honors. I also have prepared a witness specific binders.

JUDGE PAYNE: That will be fine.

MR. GORE: If I can hand those up.

JOHN MORGAN, called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GORE:

Q Good afternoon, Mr. Morgan.

A Good afternoon.

Q Mr. Morgan, will you introduce yourself to the Court?

A My name is John Morgan.

Q How do you spell your name?

A M-o-r-g-a-n.

Q Where do you live?

A I live in Fairfax, Virginia.

Q What do you do for a living?

A I'm a demographer, a redistricter. I do demographic and legislative analysis.

Q Where are you employed?

A Applied Research Coordinates.

Q What is your position there?

A I'm president of that company.

Q In what year did you join Applied Research Coordinates?

A Well, I joined the firm in 1991, and I've worked, you know, in other jobs during that time, but 1991 is when I started.

Q Will you turn in your binder to Tab 1, which is Intervenor-Defendants' Exhibit 12?

A Yes.

Q Is that the most recent copy of your C.V.?

JUDGE PAYNE: Is he accepted as an expert?

MR. HAMILTON: He is, Your Honor.

JUDGE PAYNE: In what area?

MR. GORE: Demography and redistricting.

JUDGE PAYNE: In those areas?

MR. HAMILTON: No objection, Your Honor.

JUDGE PAYNE: All right.

BY MR. GORE:

Q Mr. Morgan, following the 1990 Census, were you involved in redrawing redistricting plans?

A Yes.

Q In what states were you involved in that work?

A I was involved in Florida, Illinois, Indiana, Michigan, Wisconsin, New Jersey, New York, and—let's see if I missed one. I think that's it.

Q How about following the 2000 Census?

A After that, I worked in some of those same states, but I also added Georgia, Iowa, North Carolina, and Rhode Island.

Q How about following the 2010 Census?

A In the 2010 Census, I worked in Connecticut, Indiana, Georgia, Kansas, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina and Virginia.

Q Which plan were you involved in drawing in Virginia in 2011?

A I assisted in drawing the House of Delegates' plan.

Q What was your role in the drawing of that plan?

A Well, I worked with the attorneys for the delegates and I also worked with the delegates directly in helping them draft a plan to put before the General Assembly.

Q Were you involved in drawing the Congressional Redistricting Plan in Virginia in either 2011 or 2012?

A No.

Q Have you ever drawn redistricting plans for local governments?

A Yes.

Q Where have you done that?

A I've drawn local plans in Muncie, Indiana; Atlantic City, New Jersey; Newark, Essex County, New Jersey; Ocean County, New Jersey; Raleigh, North Carolina; Craven County, which is New Bern, North Carolina; Sampson County and Fayette County, Georgia.

Q When you're hired to draw redistricting maps, who ordinarily retains you?

A Generally, I'd be hired by the Republican members of the Caucus for Leaders of the House or Senate or Republican members of the commission.

Q Have you ever worked with Democrats in drawing redistricting plans?

A Yes, I have.

Q How has that been?

A Well, typically, as part of the redistricting process, I would work with Democrats as part of negotiations with other members of the General Assembly.

I would also in some cases, since I'm working directly with the commission, I would be hired by the county or the whole commission and work with the members of both parties.

In one case in Florida, I worked with Democratic law makers directly. In fact, Representative Corrine Brown, who's now a congresswoman, she praised my work on the floor of the Florida House.

Q Have you received training in redistricting?

A Yes.

Q From whom?

A I've received training from the Caliber Corporation, which is one of the redistricting software vendors. I've also received training from Republican organizations, and also from the National Conference of State Legislators.

Q Have you ever trained other people in how to draw redistricting plans?

A Yes.

Q On whose behalf have you done that?

A I volunteered for the NCSL, which is the Conference of State Legislators. I've also worked with Republican organizations, and I've trained legislators who are going to be involved in the redistricting process.

Q Have you ever been qualified to testify in court?

JUDGE PAYNE: I think he's accepted him as an expert.

MR. GORE: I'm just laying the foundation, Your Honor. Thank you.

JUDGE PAYNE: Well, I think it's in his C.V., which we've got.

MR. GORE: Thank you. Okay.

Q Are you being paid for your work in this case?

A Yes, I am.

Q How much?

A $250 an hour.

Q Is that amount contingent in any way on the outcome of this case?

A No.

Q Have you prepared an expert report in this case?

A Yes.

Q Will you turn to Tab 2 of your binder, which is Intervenor-Defendants' Exhibit 13? Is this a copy of your expert?

A Yes.

Q Mr. Morgan, what data and information did you consider in forming your opinions in this case?

A Well, I considered the legal briefs that were submitted to the Court, the reports by Dr. McDonald and Dr. Brunell, the portions of the Section 5 preclearance, some of the court cases that were mentioned in the briefs, maps and data sets from the current and previous congressional districts, as well as the plaintiffs' Alternative Plan. I looked at the Census redistricting data, and also political data from the Department of Legislative Services, and the State Board of Elections in Virginia, as well as the redistricting software.

Q Did you consider any data that was made available to you after your report was filed?

A Yes. I received some data from the plaintiffs', I believe Dr. McDonald's underlying data for some of his analysis.

Q Are the data, information and software the types of data, information and software that experts in your field ordinarily rely upon?

A Yes.

Q So, Mr. Morgan, what were you asked to do in this case?

A I was asked to look at the Enacted Congressional Plan and to consider whether traditional redistricting principles were subordinated to race in its drawing.

Q Were you also asked to look at the plaintiffs' Alternative Plan?

A Yes, I was.

Q Based on everything you reviewed in this case, what is your opinion regarding the Enacted Plan?

A Well, regarding the Enacted Plan, my opinion is that the Enacted Plan did not use race as a predominant factor and that it did not subordinate traditional redistricting principles. Instead, it's an incumbent protection plan, a bipartisan incumbent protection plan, that, in fact, politics and the preservation of cores and incumbent protection explain the plan more readily than race.

Q Based on everything you've reviewed in this case, what is your opinion regarding the plaintiffs' Alternative Plan?

A Well, the plaintiffs' Alternative Plan, certainly as it relates to certain traditional redistricting criteria, performs worse than the Enacted Plan, and certainly in the areas of core retention and incumbency protection it performs worse.

Q Mr. Morgan, let's talk for a moment about the background of the Enacted Plan. What was the constitutional population equality requirement for the Enacted Plan?

A The Enacted Plan would have to be at zero population, basically, within one of the ideal districts' size.

Q What was the ideal total population?

A It was 727,366.

Q So if I'm understanding correctly, did that mean that all of the eleven districts had to be within one person total population of that number?

A Yes.

Q Will you turn to Tab 34, which is Intervenor-Defendants' Demonstrative No. 10?

A Okay.

Q Were any of the benchmark districts underpopulated under the 2010 Census figures?

A Yes, they were.

Q Which districts were those?

A District 2, District 3, District 5, District 6, District 8, District 9, those were all underpopulated.

Q Were any of those districts adjacent to District 3?

A Yes, District 2 was adjacent to District 3.

Q How underpopulated was District 2?

A District 2 was underpopulated on this chart it says by 81,182. But the way I look at it, it's 11 percent, 11.2 percent underpopulated.

Q Okay. Will you turn to Tab 27, which is Intervenor-Defendants' Demonstrative 3? What is this demonstrative?

A This shows the Benchmark Congressional District 3.

This was the plan that was in force before the redistricting.

Q What effect did District 2's underpopulation have on the drawing of the Enacted Plan?

A Well, District 2, being underpopulated 11 percent, would have needed to take population from other adjacent districts. So it would have needed to have taken population from District 4 or District 3 or Districts 1. And it couldn't take population because it's a coastal district. It has the Eastern Shore and borders the Atlantic Ocean.

Q So it had to move west in order to gain population?

A Yes.

Q Where did District 2 move to gain the population it needed?

A District 2 gained a little bit of population from District 3, and the majority of its population from District 1 to achieve population equality.

Q Was there a reason that District 2 could not or did not expand into District 4 to gain population?

A Well, it could have expanded into District 4, but District 4 is the home area of Congressman Randy Forbes. He's from Chesapeake. He was a state senator there. He was also a delegate there. And that would be considered his home base, I think.

Q So what would have been the effect of moving District 2 into Chesapeake?

A Well, depending on how it would be done, it could put Congressman Forbes in with Congressman Rigell and certainly it would take the base of Congressman Forbes' district away.

Q What effect did District 2's westward expansion into District 3 have on the drawing of Direct 3 in the Enacted Plan?

A Again, District 2 took a relatively small amount of population from District 3, about 2400 people, but that would have required District 3 to get its population from other surrounding districts such as 1, 4, and 7.

Q Will you turn now to Tab 28, which is Intervenor-Defendants' Demonstrative 4? What is that demonstrative?

A This shows the enacted congressional districts.

Q Does this map show the changes to District 3 and surrounded districts that we just discussed?

A Yes.

Q What changes does this map show the Enacted Plan made to District 3 and surrounding districts?

A Well, it shows that essentially what happened in the redistricting process starting with District 2 was that District 2 took some territory from District 3, and it exchanged some territory back into District 3, and there were some trades between 3 and 2 in Hampton, but primarily what happened was District 2 took the portions from District 1 in Hampton and Newport News, and District 1 retreated from Hampton and Newport News with the exception of one precinct. And that's what happened with District 2.

Regarding District 3, District 3, which was also underpopulated, that took its population from District 4. Again, it took the City of Petersburg from District 4. It took some precincts in Henrico, and some precincts in Richmond, and in this case of Henrico and Richmond, those were localities which were already split. And in the case of Petersburg, the entire locality of Petersburg was put into District 3 from District 4.

Q Thank you, Mr. Morgan.

Let's talk now for a moment about your opinion that politics rather than race explains the Enacted Plan. In any of the reports you reviewed in this case, did Dr. McDonald consider the political effect of the Enacted Plan?

A No, he didn't consider the political effect of the Enacted Plan.

Q Did you analyze the political effect of the Enacted Plan?

A Yes.

Q Why did you do that?

A Well, I was asked to analyze the political trades and the effect of the Enacted Plan. It's my understanding that if politics—if the changes to the districts are equally explainable under politics as they are under race, that the plaintiffs would lose this case.

MR. HAMILTON: Objection. Move to strike, Your Honor. It's a legal opinion. He's not qualified to issue a legal opinion.

JUDGE PAYNE: He's explaining why he did it.

But why do we need to hear that?

MR. GORE: He was just explaining his understanding, Your Honor, of why he was asked to do it. He answered that he was asked to do it and he performed the analysis.

JUDGE PAYNE: Well, I understand. We'll strike the last part of it where he talks about who loses the case.

BY MR. GORE:

Q What election data did you use to analyze the political effect of the Enacted Plan?

A I looked at election data from the Department of Legislative Services and also from the State Board of Elections.

Q Did you prepare a chart showing the political effect of the Enacted Plan on the various congressional districts?

A Yes.

Q Will you turn to Tab 9 of your binder, which is Intervenor-Defendants' Exhibit 20? Is this the chart you prepared?

A Yes.

Q Is this Table 7 of your expert report?

A Yes.

Q What does this table show?

A This table shows the—again, this is the Department of Legislative Services election data for 2008 on this chart. And it also has the 2012 presidential election data which I received from counsel, and that's derived from the State Board of Elections' data.

And, again, what it shows here, more specifically, is it shows the political composition of the Benchmark Districts for each of the Congressional Districts 1 through 11, and then next to that is the enacted political scores for the presidential race and the difference.

And then further over it shows the 2012 data for the benchmark, the enacted, and the difference.

Q Why did you use the 2008 and 2012 presidential election results to conduct this analysis?

A Well, especially regarding the 2008 presidential election, that was election data that was available to the General Assembly at the time of redistricting. And that is something that redistricters would have not only had access to but in my opinion would have paid attention to.

Q What about the 2012 presidential election results?

A Well, as I've discussed in my report, the 2012 presidential election, while not available to the redistricters at the time, it essentially validates the presidential returns from 2008.

So when you see some of the changes that were made between the Benchmark and the Enacted Plan, there's this additional political data four years later that show a few more election results.

Q What in particular does this table show about the political effect of the Enacted Plan across the Commonwealth, across the eleven districts?

A Well, it shows that district by district—and, again, looking at the column on change, that I show the current parties of, for example, in District 1, the

current party is a Republican, incumbent Congressman Rob Whitman. And I show that the change in the 2008 presidential made the district more Republican.

So it shows, essentially, that the changes in the districts were in favor of the incumbents in most cases.

Q How many Republican districts were there in the Benchmark Plan?

A There were eight Republican districts and three Democratic districts.

Q How many of those Republican districts became more Republican under the Enacted Plan?

A Essentially, seven of the eight became more Republican.

Q How many of the three Democratic districts became more Democratic under the Enacted Plan?

A Two of the three Democratic districts became more Democratic, including District 3.

Q What were the two exceptions that did not become more politically unified one way or the other?

A Okay. On the table, District 9 gets slightly more Democratic. And, again, if we look at the Democratic vote share, the Benchmark District was 39 percent Democratic and the Enacted Plan is 39.7. So there's a slight Democratic increase. That's the Ninth District, which is in Southwest Virginia. And that's represented by Congressman Morgan Griffith, a Republican.

Q What about District 8?

A District 8 is represented by Congressman Jim Moran. And that district went from 67 percent Democratic to 66 percent Democratic. It became slightly less Democratic, essentially, to shore up neighboring District 11, which became substantially more Democratic. That's Congressman Connolly's District.

Q Did the General Assembly treat District 3 differently than other districts in terms of politics under the Enacted Plan?

A No, it treated District 3 the same way.

Q Which districts surround District 3 in the Benchmark and Enacted Plans?

A So surrounding District 3, District 2, which we talked about, District 1, District 4 and District 7 are all surrounding District 3.

Q Which of those districts are represented by Republicans?

A All four of them.

Q Who are the Republican incumbents in those districts?

A Congressman Rob Whitman from the Northern Neck, Congressman Scott Rigell—I'm Sorry. Northern Neck Congressman Whitman is District 1.

District 2 is Congressman Scott Rigell from Virginia Beach.

District 4, Congressman Randy Forbes from Chesapeake.

And then District 7 is Congressman Majority Leader Eric Cantor, who is in Richmond.

Q What was the political effect of the Enacted Plan on the four Republican districts surrounding District 3?

A They each got more Republican.

Q Now, let's talk for a moment about District 2.

According to the 2008 presidential election results, what was the political composition of District 2 prior to the Enacted Plan?

A Again, this is still on the same chart. The Benchmark District 2 was 49 percent for Senator McCain and 49 percent for Senator Obama, then a candidate for president. So it was just even-steven on the presidential vote.

Q Prior to the Enacted Plan, what was the recent political history for congressional elections in District 2?

A Well, District 2 had gone back and forth. Congresswoman Thelma Drake held the district in 2004 and 2006. She lost reelection in 2008. And Congressman Nye then succeeded her. And then Congressman Nye was defeated in 2010 by Scott Rigell, who now is the incumbent congressman from District 2.

Q Was Congressman Nye a Democratic?

A Yes, Congressman Nye is a Democrat and Congresswoman Drake and Rigell were Republicans.

Q In your opinion, why is that recent political history significant?

A Well, District 2 was a toss-up district. It's gone back and forth. And it's significant because, as a very closely divided district, the Republican-controlled

General Assembly would have had reason to protect incumbent Congressman Rigell in that district.

Q I'd like to talk now about areas that were moved in and out of District 3 in the Enacted Plan.

Did you prepare a chart showing the political composition of those areas?

A Yes.

Q Will you turn to Tab 10, which is Intervenor-Defendants' Exhibit 21?

A Okay.

Q Is that the chart you prepared?

A Yes.

Q Is it Table 8 of your expert report?

A Yes.

Q Will you turn now to Tab 35, which is Intervenor-Defendants' Demonstrative 11?

A Okay.

Q Does the chart at the top of Demonstrative 11 replicate the same data as the Exhibit 21 we were just looking at?

A Yes.

Q What is the chart at the bottom of Demonstrative 11?

A It's labeled Plaintiffs' Exhibit 28 and Intervenor-Defendants' Exhibit 21. I believe this is a chart from one of Dr. McDonald's reports showing the black voting-age percentage and racial data for those trades.

Q Let's focus on these specifics trades now. We were just talking about District 2. What were the

population and political composition of the areas moved between Districts 2 and 3 under the Enacted Plan?

A Okay. Let's see. That's row three, District 2 into District 3, 27,917 population. And that was 64 percent Democratic in the presidential election. 69 percent in 2012.

And on the portion that was moved from District 3 into District 2 was 47 percent Democratic in 2008 and then 48 percent Democratic in 2012. And that's, again, row four.

Q What is the significance of these facts?

A Well, they are, essentially, even on population. It's about a 2400 population difference, which is what I referenced earlier in taking out a slight population from District 3.

So it moved into District 3 portions that are 64 percent Democratic, which is strong Democratic territory, and then it takes—into District 3 from 2. And then it takes some territory that's relatively speaking Republican, and certainly not a Democratic stronghold, from 3 into 2.

Q What would the effect of this trade have been on District 2's political composition?

A Well, again, this was District 2. And the Benchmark was an evenly divided district. So this would have helped Congressman Rigell by adding some more Republican territory and taking some Democratic territory out.

Q Referring to Demonstrative 11, what was the racial composition of those areas moved between Districts 2 and 3 in the Enacted Plan?

A So, again, this is row three and four in the second table. And the population numbers are the same. And then if you look over to the black voting-age population, the portion moved into District 3 was 36.7 or 37.9 under the two metrics Dr. McDonald has. And then the portion moved out of District 3 into District 2 was 18.3 or 18.8 percent African-American.

Q So what is the difference in the Democratic vote share between these two areas?

A Okay. Well, if you look back up at rows three and four, so it's 64 percent Democratic vote share and 47 percent Democratic vote share. So it's about a 17 percent difference.

Q What is the difference in the BVAP or black voting-age population between those two areas?

A Again, this is row three and four. And the bottom chart 36 and 18 is about 18 percent difference.

Q How does the difference in political composition compare to the difference in BVAP?

A They are essentially the same.

Q Is there a similar pattern in the traded areas between District 3 and other surrounding districts?

A Yes.

Q Let's move to District 4.

What was the population and political composition of the areas moved between Districts 3 and 4 in the Enacted Plan?

A Okay. These are rows five and six in the chart. So the portion that was taken from 4 and put—

JUDGE PAYNE: Excuse me. Chart meaning 35 now?

THE WITNESS: Yes, sir.

MR. GORE: The top chart behind Tab 35. There's a page with two charts.

JUDGE PAYNE: Yes, but earlier he had referenced an earlier chart. I just wanted to make sure.

THE WITNESS: Sorry.

JUDGE PAYNE: Okay.

A Okay. So the two charts on this page, and this is, it says, 4 to 3. So it's 35,000 population. 35,447. And the Democratic vote share for president in 2008 is 86 percent. That's essentially the City of Petersburg, which we've had discussed about earlier.

And then the portion that's moved from District 3 into District 4 is a smaller population, 5713, and that is 53 percent Democratic.

Q What is the significance of this trade?

A Well, again, it removes highly Democratic territory from District 4, puts it into District 3, and then it takes a smaller amount of population from District 3 into 4. And this has the effect of increasing the Republican strength of District 4 and the Democratic strength of District 3.

Q What is was the racial composition of the areas moved between Districts 3 and 4 in the Enacted Plan?

A Okay. In the chart below, it shows that information. So the portion that was taken from District 4, put into District 3, is 35,447. And it's 75

percent African-American, 75.1 or 75.8, the two numbers at the end of the chart.

Q How about the area moved from District 3 to District 4?

A 41.4 or 42.1 percent.

Q What is the difference in Democratic vote share between these two areas?

A Again, in the first chart, it's a difference in 2008 of 86 percent and 53 percent. So it's 33 percent.

Q What is the difference in BVAP between those two areas?

A 75 minus 41 is 34 percent.

Q How does the difference in political composition compare to the difference in BVAP?

A They are essentially the same.

Q Let's move to District 7. What were the population and political composition of the areas moved between Districts 3 and 7 in the Enacted Plan?

A The area moved from District 7 into District 3 is 85 percent Democratic. It's 36,000 people in 2008 presidential.

And then the area moved from District 3 into District 7, which is essentially New Kent County, is 36 percent Democratic.

Q What is the significance and effect of this trade?

A Well, New Kent County would—again, the portion moving into District 7 from 3 is a Republican area, which would help Congressman Cantor's

district. And then the areas moved from 7 into 3 are strongly Democratic areas.

Q What was the racial composition of those areas moved between Districts 3 and 7 in the Enacted Plan?

A That's the last two rows of the bottom chart. And that's 64 percent African-American, 64.4 or 65. And then the portion moved from 3 into 7 is 14.1, 14.5.

Q So what is the difference in Democratic vote share between those two areas?

A It's essentially 49 percent.

Q How about the difference in BVAP?

A 50 percent.

Q How do those two differences compare to each other?

A They are essentially the same.

Q Let's move now to District 1. What were the population and political composition of the areas moved between Districts 3 and 1 in the Enacted Plan?

A Okay. The area moved from District 1 into District 3, which is the first line in the chart, is 60 percent Democratic under the 2008 presidential.

And it's 23,288 people. And then the portion moved from 3 into 1 is relatively smaller, 7351 population, and 75 percent Democratic.

Q Is this different than what we saw in the trades between District 3 and other surrounding districts?

A Yes. The percentages are different than the other examples.

Q How is that?

A In this case, the population moving from 3 into 1 has a higher Democratic vote share at 75 percent than the area moving from 1 to 3, which is 60 percent.

Q Is this trade still consistent with the political effect of strengthening incumbents in District 3 and, more particularly, surrounding districts?

A Yes, because of the size of the population, the differences are such that the—even though the area moving from 3 into 1 is more intensely Democratic, it's also smaller. And the area moving from 1 into 3 is, you know, it's still Democratic, but it's not as intense, but there's a lot more Democratic territory.

Q So when you look at the political effect of these changes to District 3 and surrounding districts, what is your conclusion about the Enacted Plan?

A Well, the Enacted Plan makes these political trades, and, as such, it unifies the political composition of the districts in favor of the incumbents in all instances in this area.

Q Would the General Assembly have had reason to make these trades between District 3 and surrounding districts regardless of the race of the affected voters?

A Yes, it politically strengthens incumbents of both parties.

Q In your opinion, do these trades between District 3 and surrounding districts support Dr.

McDonald's conclusion that race predominated in drawing the Enacted Plan in District 3?

A No, they don't support that conclusion because, as I've seen in this data, politics is an explanation for these trades.

Q Thank you, Mr. Morgan.

You previously testified as an expert in a Section 2 case on behalf of Fayette County, Georgia; is that right?

A Yes.

Q What were the plaintiffs in that case suing about?

A They were suing for the first time creation of a majority-minority district in Fayette County, which had previously had at-large elections.

Q What was your understanding of the issue the Court was required to resolve in that case?

A Well, as a Section 2 case, they have to determine if there's a Section 2 liability. And then, if so, find an appropriate remedy for that.

Q Did you conclude in that case that race predominated in the majority black district that the plaintiffs—

JUDGE PAYNE: Can you tell us why—

MR. GORE: This came up at his deposition, Your Honor.

JUDGE PAYNE: A lot came up at his deposition, but what's this case in Georgia got to do with this case?

MR. GORE: I anticipate it's going to be a subject of his cross-examination.

JUDGE PAYNE: Well, if it is, you can deal with it on redirect.

MR. GORE: I will do that, Your Honor. Thank you.

BY MR. GORE:

Q Now, Mr. Morgan, there's some talk today about the VTD analysis that Dr. McDonald conducted with respect to the Enacted Plan.

A Yes.

Q Are you familiar with that analysis?

A Yes.

Q What was Dr. McDonald's analysis?

A Well, Dr. McDonald analyzed VTDs that were 55 percent Democratic voting strength, and he looked at those that were inside Enacted District 3, and those that were 55 percent plus that were outside of Enacted 3, and localities adjacent to Enacted District 3.

Q How many sets of VTDs did Dr. McDonald identify?

A He identified 189 that were inside District 3 and 116 that were outside District 3 in localities that were adjacent to District 3.

Q What was the average BVAP in those two sets of VTDs?

A The average black voting-age strength of the VTDs in District 3 was 59.5 percent. And I think the average black voting-age strength of the VTDs in adjacent localities was 43.5.

Q What was Dr. McDonald's conclusion based on that analysis?

A Well, he concluded that because there was a 16 percent difference in the average black voting-age population of the VTDs inside the district and those Democratic performing VTDs outside the district, that race was the primary concern over politics in the Enacted Plan.

Q Do you agree with that conclusion?

A I don't.

Q Why not?

A Well, because, as I've seen and discussed in the data, politics is equally—explains equally those trades that were made. And in looking at the highly performing Democratic VTDs, it's been discussed, and I agree, that there's a range of voter strength in those VTDs, not simply 55 percent. Some of those 55 percent VTDs are much stronger than others.

Q Do you believe there are any other reasons why Dr. McDonald's method of analysis is unreliable or not useful?

A Yes.

Q What are those?

A Well, just with the methodology?

Q Yes.

A Okay. Well, some of the VTDs included in the 189 are essentially located within District 3, and they are, essentially, not going to be available for trades to other districts nearby. So they're strong Democratic performing VTDs, but they are locked into District 3.

Q How about the VTDs that are in localities adjacent to District 3?

A Well, in Dr. McDonald's report, he identifies four localities that are not included in his data set, which was provided by the NCEC, the National Committee for an Effective Congress.

And those four localities, two are in the district, Charles City County, and then, let's see, the other one that was in the district was Surry County. And then there are two that are located outside the district. And that's Colonial Heights and Southampton. And he said he did not have data available for those.

So with that caveat, which he identified in his report, he still made the VTD analysis.

Q Of the 116 VTDs that were in localities adjacent to District 3, were they located on the border with District 3?

A No, they were not all located on the border. In fact, some of the VTDs are up to 30 miles away from District 3. They are in a locality that may be adjacent to District 3, such as Sussex County, but the VTDs in question are not on the border.

Again, some areas are 20 miles away. Some areas are 30 miles away.

Q How does the racial composition of District 3 in the surrounding districts affect this analysis as well?

A Well, District 3 is a majority African-American district. And so it doesn't seem surprising that most of the VTDs in the sample of those VTDs are going to have a high black voting-age population. And the surrounding districts, which are not majority black districts, have a lower black voting-age average, even in the Democratic performing VTDs.

Q Did Dr. McDonald consider which of these VTDs or in which districts these VTDs were located under the Benchmark Plan?

A Well, not in this analysis, and I think there's been discussion and I agree that most of these highly-performing Democratic VTDs are 55 percent and up that are in the Enacted Plan are in fact also in the Benchmark Plan.

Q Are you familiar with the data that Dr. McDonald used to perform his VTD analysis?

A I am familiar with that data, yes.

Q And it came from this group, the NCEC?

A Yes.

Q What is the NCEC?

A The National Committee for an Effective Congress.

Q And what is its mission?

A Well, my understanding is it's a liberal organization that—

MR. HAMILTON: Objection to the question, Your Honor. Lack of foundation.

Q Do you know what the NCEC's mission is?

A I have dealt with the NCEC in my work. And I understand them to be a liberal organization that favors congressional candidates that are progressives.

Q When did you receive the NCEC data?

A I received the NCEC data after I had done my report in the early part of April as part of the

documents that Dr. McDonald produced for his deposition, I believe.

Q You already mentioned that there were some omissions from the data with respect to four localities; is that right?

A Yes.

Q When you reviewed the NCEC data, did you discover any flaws in it?

A Yes.

Q What were those flaws?

A Well, the first flaw is that the VTD data set that is represented as a set of VTDs are not the 2010 VTDs.

They are, in fact, the 2012 VTDs.

Q Were all of these VTDs counted once?

MR. HAMILTON: Objection, Your Honor. None of this is in Mr. Morgan's report.

MR. GORE: The reason it's not in his report, Your Honor, is because he didn't get the data until after his report was due. It was something that was turned over by Dr. McDonald before his deposition. Mr. Morgan analyzed the data at that point. So it couldn't possibly have been in his report.

JUDGE PAYNE: Is that right?

MR. HAMILTON: It was produced.

JUDGE PAYNE: Dr. McDonald testified about this earlier today, did he not?

MR. HAMILTON: That's a different issue, I believe, but yes, it's the same data set. We've had

these documents going back and forth all the way up to four o'clock yesterday.

JUDGE PAYNE: Objection overruled. If it came in late and you-all agreed to deal with it as a supplemental report, then that's how we'll treat it.

MR. GORE: Thank you, Your Honor.

BY MR. GORE:

Q Were there any other flaws in the data?

A Well, yes. In looking at the NCEC data that I received finally from Dr. McDonald, one of the reasons I didn't perform necessarily a similar VTD analysis is I couldn't replicate the data because the precincts were different.

The 2012 precincts were the ones that were in the NCEC data, not the 2010 VTDs that would have been used at the time of redistricting. And, in addition, the VTDs in this NCEC data set are double counted. There are many instances of VTDs that are counted twice, including highly performing Democratic VTDs that are counted more than once.

Q Were you able to replicate Dr. McDonald's analysis and numbers using the NCEC data?

A Once I got the data, I was able to replicate the numbers he came up with, yes.

Q Did you perform a similar VTD analysis of the Alternative Plan using the NCEC data?

A Yes.

Q Why did you use the flawed NCEC data to perform these analyses?

A Well, I trying to make an apples-to-apples comparison using the same data set.

Q Have you prepared charts that show the results of these analyses?

A Yes.

Q Will you turn to Tab 17 of your binder, which is Intervenor Defendants' Corrected Exhibit 50.

A Okay.

Q Are these the charts you prepared?

A Yes.

Q Does the top chart show your replication of Dr. McDonald's VTD analysis for the Enacted Plan as well as other information?

A Yes, it shows portions that Dr. McDonald had in his report with some additional data that was from the NCEC data and derived from them.

Q Is the bottom chart your parallel analysis for the Alternative Plan?

A Yes.

Q Now, when you first were using the flawed NCEC data, did you make a mistake in assigning some VTDs to whether they had been in or out of benchmark District 3?

A Well, what I would do, in answering that question, is I would point out that the portion that Dr. McDonald discusses in his report—and you can see in the top left there's 189 VTDs in Enacted 3, and then on the outer column there's 116 in localities adjacent to District 3. Those numbers agree exactly with Dr. McDonald's numbers.

Again, so columns one and four are going to agree exactly with Dr. McDonald's VTD count. The area where I erred was in showing the total number of

VTDs that were in both the enacted District 3 and the benchmark District 3. And, essentially, that centered around Petersburg and one additional VTD in Hampton that I had mislabeled. So it was a net difference of just a few.

Q Did you correct that data?

A Yes.

Q Is Exhibit 50 a corrected exhibit based on that corrected data?

A Yes.

Q Did those corrections change any of the numbers in the first or fourth column of your chart?

A No, there was no impact on the first column or the fourth column.

Q Did they change some of the numbers in the second and third columns?

A Yes, and there's been discussion about the character of the VTDs that were highly Democratic that were in the benchmark and in the enacted district.

JUDGE PAYNE: Is your point that 17 is the one he's relying on?

MR. GORE: Yes.

JUDGE PAYNE: And that he made some mistakes. Those mistakes were attributable to the flawed data that you've explained?

MR. GORE: Yes.

JUDGE PAYNE: Then if he wants to attack him on cross-examination about it now that we understand the circumstances, let him do it. You don't need to explain it away. That just takes a lot of

time and it's distracting from understanding what point you really are trying to make.

MR. GORE: I understand. I was moving to that point now, Your Honor.

JUDGE PAYNE: Well, I was too late.

MR. GORE: I was too late, I think, Your Honor, by one question.

Q What did the first and last columns of this chart show?

A Okay. Again, most of this material was in Dr. McDonald's report. Again, I point to the 189 VTDs in enacted District 3 and that the average black voting-age population was 59.5.

And then on column four, there were 116 VTDs that are in localities adjacent to enacted District 3 as defined by Dr. McDonald and his data set, and that the average black voting-age population was 43.5.

The additional information was I also provided the average Democratic vote share, which is in the second row. So the average Democratic vote share of the VTDs, the highly Democratic VTDs, 55 percent plus, is 80.9 percent in enacted District 3.

And then over on the fourth column in the second row, the average Democratic performance of the VTDs is 65.4 in the localities that are adjacent to enacted District 3.

Q Just to make sure I'm understanding this correctly, instead of treating all the highly Democratic VTDs as 55 percent, you actually calculated the averages using the actual numbers?

A Yes.

Q Whether above 55 percent or how far above it was?

MR. HAMILTON: Objection. Leading.

JUDGE PAYNE: Overruled.

A Yes, I performed the same average that was produced on the average black voting-age population, but for the Democratic vote share.

Q What do columns one and four tell you about these two sets of VTDs that Dr. McDonald identified?

A Well, it shows me that the VTDs that are inside District 3 are, again, at 80—basically, 81 percent Democratic versus the Democratic VTDs that are outside at 65 percent. The areas inside District 3 are much more Democratic than the areas—the VTDs that are Democratic that are outside of District 3.

Q What is the difference in average BVAP between these two sets of VTDs?

A It's about 15.5—15.5.

Q That's the difference in BVAP?

A I'm sorry. That is not the difference in BVAP. The difference in the black voting-age population is 16 percent.

Q How about the difference in Democratic vote share?

A That is 15.5.

Q How do those two numbers compare to each other?

A They are essentially the same.

Q When you consider the actual averages of the BVAP and Democratic vote share, what is your opinion about the Enacted Plan?

A Well, in terms of looking at the Democratic performing VTDs, the difference in the average black voting-age strength and the average Democratic performance are essentially the same. So politics and race are very congruent here.

Q In your opinion, does Dr. McDonald's VTD analysis support the conclusion that race trumped politics in District 3?

A Well, again, the VTD analysis, subject to all the other discussions of the data, it shows that politics is an equally explainable—the Enacted Plan is equally explainable under politics as it is under race.

Q What conclusions, if any, do you draw from the second and third columns of this chart?

A Well, my main point in doing this, and maybe it wasn't necessary to put it into a chart, but the idea was basically to show that most—an overwhelming majority of the Democratic performing VTDs were already in the benchmark district.

Q Does the chart on the bottom of Exhibit 50 show your parallel VTD analysis of the Alternative Plan?

A Yes.

Q What do the first and last columns of that chart show?

A It shows that there were 160 VTDs in alternative districts 3 that were 55 percent Democrat or above and there were 145 VTDs that were in

localities adjacent to alternative District 3, again, as defined in this data set.

And then the average black voting-age population of those in District 3 was 59.8 and the average Democratic—sorry. The average black voting-age strength was 46.4 in the VTDs outside of District 3.

Q How about the average Democratic vote shares in those two sets?

A It was 80.6 in District 3 and 68.8 outside of District 3.

Q So what is the difference in the average BVAP between the two sets of VTDs and the Alternative Plan?

A The average difference first in the black voting-age population is 13.4 and the average difference in the Democratic vote share is about 13.8.

Q So does the Alternative Plan fix the—

A I'm sorry. 12.8. No, 11.8. Let me get this right, I'm sorry. I'm doing the math on the fly. Do I want a calculator? No, I think we'll be okay.

Q So what is the difference in average Democratic vote share?

A It's 11.8.

Q So does the Alternative Plan fix the alleged racial pattern in the VTD samples that Dr. McDonald identified in the Enacted Plan?

A Again, focusing on what Dr. McDonald concluded was the important metric, the difference between the average black voting-age population of the VTDs in the Alternative Plan, or in this case the Enacted Plan, and the average black voting-age

strength of the VTDs outside of it, the difference in the Enacted Plan is 16 percent and the difference in the Alternative Plan is 13.4 percent.

JUDGE PAYNE: But the question was: Is your opinion that the alternate does or does not fix the VTD problem that was identified by Dr. McDonald?

THE WITNESS: I see similar characteristics. I don't see that it fixes the problem as described in the question.

JUDGE PAYNE: So the answer is no?

THE WITNESS: The answer is no.

BY MR. GORE:

Q Mr. Morgan, I'd like to ask you a little bit about your opinion regarding the Alternative Plan. And you can look at these maps up here if that's easy for you and you want to refer to those.

What is the difference between the Alternative Plan and the Enacted Plan?

A Again, the Enacted Plan is on my left and the Alternative Plan is on my right. The Enacted Plan, as we've discussed, and the Alternative Plan are the same except in the boundaries between Districts 2 and 3.

Q Are all of the other districts in the Alternative Plan and Enacted Plan identical?

A Yes.

Q Does this demonstrative here show all of the differences between the enacted District 3 and the alternative District 3?

A Between the enacted and the alternative, yes.

Q What was the—what is the BVAP in enacted District 3?

A It was, I believe, 53.2 percent. No, that was in the benchmark. I apologize. It was 56.2 percent in the enacted district.

Q How about in the Alternative Plan?

A 50.2 on the exclusive metric.

Q So do these changes to the composition of District 3 decrease the BVAP in District 3?

A Yes.

Q By how much?

A Between the enacted and the alternative, it's about 6 percent.

Q Okay. Dr. McDonald has testified that the Alternative Plan subordinates traditional redistricting principles to race. What is your opinion regarding the role of race in the Alternative Plan?

A Well, I would say that the Alternative Plan is at least as race conscious as the Enacted Plan because it replicates the same trades on the northern end of District 3 that Dr. McDonald criticized and it lowers the black voting-age population from the benchmark, which was 53 percent, to 50.2 percent, and in that sense it's aiming for a specific target that is essentially 50 percent.

Q What are the trades on the northern end of the district that the Alternative Plan replicates?

A Those were the trades that Dr. McDonald criticized putting Petersburg into District 3 from District 4, which he concluded was predominantly racial, taking New Kent out of District 3 and putting

it into District 7, and then taking the VTDs in Henrico and Richmond into District 3 in drawing the plan on the northern end of the district.

Q So to offset those trades, what trades does it make differently on the other end of the district to get to the 50.2 percent BVAP level?

A Well, I suppose you can look at it one of two ways. Either if you make the trades on the northern end of the district, then the Alternative Plan District 3 reduces the black voting-age population down to its target of 50 percent by making trades between Districts 2 and 3 in Norfolk and in Hampton and in Newport News to reduce the black voting-age population or you can look at it the other way, which is that the trades on the southern end of the district reduced the black voting-age population below the level of the majority relative to the benchmark, and then it would need to go get additional black voting-age population from the areas on the northern end of the district; Petersburg, Henrico and Richmond.

Q In your opinion, is the Alternative Plan justified by the nonracial explanation of politics, preservation of cores, or incumbency protection?

A No, not on politics, core preservation or incumbency protection because it has a dramatic political effect on Congressional District 2 by placing all of Norfolk into Congressional District 2.

Q You mentioned earlier in your testimony that in the Benchmark Plan, District 1 occupied much of Newport News and also extended into Hampton. Do you remember that testimony?

A Yes. District 1 was, in the Benchmark Plan, included portions of Newport News and portions of Hampton.

Q And you testified, I believe, that the Enacted Plan moved most of that area into enacted District 2?

A Yes, most of the population from District 1 was moved into District 2. It needed population to get to population equality.

Q What was the effect of the Enacted Plan's movement of that territory from District 1 to District 2?

A So the portion of Newport News that was moved from District 1 into District 2 was fairly evenly divided. It's slightly Republican relative to that part of the world. So it had the effect of helping District 2. And actually District 2 before and after redistricting is still very evenly divided. It's still about a 50/50 district.

Q What does Alternative Plan do differently with that territory that was in benchmark District 1?

A Well, it takes all of the territory that was available for Congressional District 2, which was, you know, politically somewhat helpful to District 2 and it puts it entirely in District 3, and therefore it has quite an effect on District 2, especially in conjunction with Norfolk's population added to District 2.

Q Have you prepared a chart showing the population affected by the trades between Districts 1 and 2 and Districts 2 and 3 in the Enacted and Alternative Plans?

A Yes.

Q Okay. Will you turn to Tab 6, which is Intervenor-Defendants' Exhibit 17?

A Okay.

Q How many people total were moved between Districts 1 and 3 or affected by the moves between Districts 1 and 3 in the Enacted Plan?

A Okay. So in moving from the Benchmark Plan to the Enacted Plan, the population moved in and out of District 3 and 1, it was 23,000 and 7,000. So the subtotal on this page is 30,000 affected population between 1 and 3.

And then down below, District 2 and 3 trade population, but the sum of those is 53,000 that are affected between the Benchmark and the Enacted. So the overall affected population is 84,000, which is, in this chart, it shows it's 11.6 percent of an ideal congressional district.

Q How many—turning to the chart on the right, how many total people were affected by the trades between Districts 1 and 3 in the Alternative Plan?

A Well, as we discussed, the Alternative Plan takes portions of District 1 and puts them into District 3, and that's 100,000 people. And then that same precinct we've mentioned, the 7351, goes out, and add those two together, it's 114,000. And then the population that goes from 2 to 3, which is, essentially, Hampton, is 45,000, and the portion from 3 to 2 is 126. So that's 172.

And then subtotaling the subtotals or totaling the subtotals, it's 287,000, which is 39.5 percent of an ideal district.

Q So how does the total number of people affected by the Alternative Plan's trades compare to the total number of people affected by the Enacted Plan's trades?

A Well, the Alternative Plan relative the Benchmark affects a lot more people.

Q And is there a reason why the Alternative Plan affects more people or has to *have* this effect in order to accomplish the objectives of the Alternative Plan?

A Well, as I understand it, the objectives were to lower the black voting-age population of the alternative district to a lower number, and it also, as has been discussed, there's one fewer locality split in the process of doing that.

Q Have you prepared a chart showing a racial composition of the trades between Districts 1 and 3 and Districts 2 and 3 in the Enacted Plan?

A Yes.

Q Will you turn to Tab 7, which is Intervenor-Defendants' Exhibit 18?

A Okay.

Q Is this the chart you prepared?

A Yes.

Q What was the racial effect of the trades between Districts 1 and 3 in the Enacted Plan?

A Well, between 1 and 3, the percentage of black voting-age population was about 4 3 percent in the portion that went into District 3 from District 1, and the portion that went out of District 3 into District 1 was about 43 percent. So the percentages are about the same.

The numbers are a little different as a net result of that trade. About 5,500, 5,600 black voting-age population is moved into District 3.

Q What is the racial composition of the trades between Districts 2 and 3?

A In Districts 2 and 3, the trades, again, are essentially equal in population. There's a net 2400 to District 2 from District 3, and the portion moving from 2 to 3 is 36.7, 37.9 percent African-American, and the portion moving out is 18.3, 18.8 percent.

Q What is the net total number of voting-age population brought into District 3 through these trades?

A The net voting-age population?

Q Yes.

A It's 13,193.

Q What's the net total number of black voting-age population brought into District 3 through these trades?

A Well, it says 93, 99, and 96.58.

Q Have you also prepared a chart showing the racial composition of the trades between the Districts 1 and 3 and Districts 2 and 3 in the Alternative Plan?

A Yes.

Q Will you turn to Tab 8, which is Intervenor-Defendants' Exhibit 19?

A Yes.

Q Is this the chart you prepared?

A Yes.

Q So what is the racial composition of the areas traded between Districts 1 and 3 in the Alternative Plan?

A The portion traded from District 1 to District 3, it's 100,000 people, and it's 29.6 percent African-American voting age and 30.3. And then the portion out is, again, that same VTD, Greenwood, Newport News, that's 43.6 and 44.8.

Q How does this racial composition compare to the racial composition of the Enacted Plan's trades between those districts?

A Well, it adds more—it adds more total black voting-age population, but, as a percentage, it's much lower than the portions that were added in the Enacted Plan.

Q Okay. What is the racial composition of the areas traded between Districts 2 and 3 in the Alternative Plan?

A So the portions moved from District 2 into District 3, which is, essentially, Hampton, is 27 percent, 27.7 percent African-American voting age, and it's about 46,000 people. And the area removed from District 3 put into District 2 is 126,980 population, and that's 56.8, 57.6 percent African-American.

Q So, Mr. Morgan, as a result of all these trades involving District 3, what is the net total voting-age population brought into District 3 in the Alternative Plan?

A So there's a net of 16,541 voting-age population.

Q What's the net change to the black voting-age population as a total number?

A It's reduced by 23,293 or 23,232.

Q So the Alternative Plan brings 16,541 people of voting age into the district but does so in such a way as to remove 23,2 93 black persons of voting age; is that right?

A Yes.

Q What is the overall effect of these trades on the BVAP in alternative District 3?

A Well, as a result of these trades in conjunction with the other changes that are replicated in both the Enacted and the Alternative Plan, this lowers the black voting-age population of the Alternative Plan from 53.1 to 50.2.

Q So assume with me for a moment that the drafter of the Alternative Plan had made these trades first before equalizing the population in District 3, what would the effect on District 3's VBAP have been?

A Well, with these trades alone, the black voting-age population would have gone below the benchmark level of 53 percent and it would have, in fact, gone below a majority of 50 percent. It would have been, again, below majority.

Q In that scenario, what would the drafter of the Alternative Plan have needed to do in order to raise District 3's BVAP back up to a majority black level?

A The plan drafter would have had to take additional black voting-age population from somewhere else instead of from Norfolk, which was right there.

Q Based on your analysis of these trades, what is your opinion about the role of race in the Alternative Plan?

A Well, as I mentioned, race is predominant in the Alternative Plan in the sense that all of these trades are serving to reduce the black voting-age strength just to a barely 50 percent level.

Q Thank you.

MR. GORE: If I may ask the Court what the Court's preference is for concluding today. I'm at a stopping point, but I'm happy to keep on.

JUDGE PAYNE: We' d like to conclude to the extent it's possible to do so. How much longer do you think you have?

MR. GORE: Maybe another hour.

JUDGE PAYNE: That' s all you've got is—you don't have any other witnesses other than Dr. Morgan?

MR. GORE: Mr. Morgan is our only witness, that's right, Your Honor.

JUDGE PAYNE: And then there's cross-examination of Mr. Morgan and redirect.

MR. GORE: Correct.

JUDGE PAYNE: All right. We'll conclude this evening, but now that assumes that you have an hour. And the cross examination is how long, Mr. Hamilton or whoever is going to do it?

MR. HAMILTON: I would imagine about two hours, Your Honor.

JUDGE PAYNE: Okay. And your redirect is not going to be very long.

MR. GORE: I don't imagine so, Your Honor.

JUDGE PAYNE: All right. And there are no other witnesses; is that correct?

MR. HAMILTON: We would call Dr. McDonald in our rebuttal case, Your Honor.

JUDGE PAYNE: How long do you think that' s going to be?

MR. HAMILTON: Probably no more than an hour.

JUDGE PAYNE: Your part of it?

MR. HAMILTON: Correct.

JUDGE PAYNE: Is my math correct that you think we're looking at five or six hours tomorrow? You have an hour. He has, what, two hours for cross-examination?

MR. HAMILTON: That's correct, Your Honor.

JUDGE PAYNE: That's three. And then you have redirect, which is short.

MR. GORE: Yes.

JUDGE PAYNE: And Dr. Morgan on direct for an hour. Mr. Carvin will, I guess, do the cross. I mean Dr. McDonald. So four and a half, five hours.

All right. You can leave your materials here if you'd like to. The courtroom will be locked up and you're welcome to leave your materials here.

We'll start at nine o'clock in the morning.

MR. GORE: Thank you, Your Honors.

JUDGE PAYNE: Thank you. (The proceedings were adjourned at 5:30 p.m.) We, P. E. Peterson and Diane J. Daffron, certify that the foregoing is a

correct transcript from the record of proceedings in the above-entitled matter.

/ s /
P.E. PETERSON, RPR, CCR DATE

/ s /
DIANE J. DAFFRON, RPR, CCR DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAWN CURRY PAGE, et al.,	:	
	:	
Plaintiffs,	:	Civil Action No.:
vs.	:	3:13CV678
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	:	May 22, 2014
	:	
Defendants.	:	

COMPLETE TRANSCRIPT OF THE BENCH TRIAL

HEARD BEFORE: THE HONORABLE ALLYSON K. DUNCAN
THE HONORABLE LIAM O'GRADY
THE HONORABLE ROBERT E. PAYNE

* * *

[Page 311]

BY MR. GORE:

Q And what is your opinion on that question?

A The alternative plan—looking at the criteria on the Senate criteria, the alternative plan compared to the enacted plan performs worse, as we've discussed, in the areas of the incumbency protection and preserving the cores of districts in the plan.

Q Is preserving a core a traditional districting principle in your opinion?

A Yes, and it's mentioned in these Senate criteria as governmental jurisdictions.

Q What is the purpose of preserving the cores of districts?

A Well, preserving the core of districts, it better facilitates the communities of interest that are formed around the districts, the benchmark or enacted districts, and you can measure how well the plans retain the core of the benchmark districts. So it facilitates better the communications between constituents and elected members.

Q How can preservation of cores be measured?

A Basically as a percent of the population of the preexisting districts. So in this case, you would look at the population from the previous district that's still in the new district.

Q Will you turn to tab 16 which is Intervenor Defendants' Exhibit 27. Did you prepare this chart?

A Yes.

Q And what is this chart?

A This shows the preservation of cores in the benchmark—from the benchmark districts in the enacted plan and the alternative plan.

Q And what does this chart show about the retention of districts in the enacted plan and the alternative plan?

A It shows that the core retention percentages in the enacted plan were higher than the core retention percentages in the alternative plan, in particular in Districts 2 and 3 which are the two districts that changed between these two plans.

Q Viewing across all 11 districts, how much of the cores of districts does the enacted plan preserve?

A The enacted plan preserves the cores of the districts. The lowest is 71.2 percent in District 11, and the highest is 96.2 percent in District 4, so it's a range there, and I believe nine—I think I believe I said in my report that nine of the 11 districts preserve 83 percent or more of the cores of the districts.

Q How much of the cores of Districts 2 and 3 does the enacted plan preserve?

A District 2 preserves 85 percent of the core of District 2, and District 3 is 83.1 percent of the core.

Q And does the enacted plan treat District 3 differently than other districts with respect to preservation of core?

A No, it treats it equally.

Q How much of the cores of the Districts 2 and 3 does the alternative plan preserve?

A The alternative plan preserves 82.5 percent of District 2 and only 69.2 percent of District 3.

Q And does the alternative plan treat District 3 differently than the other districts with respect to the preservation of cores?

A Yes. District 3 in the alternative plan would be the lowest preservation of cores of any district in the alternative plan or even in the enacted plan.

Q Mr. Morgan, is protection of incumbents a traditional redistricting principle?

A Yes.

Q And have you analyzed the protection of the incumbents enacted in the alternative plan?

A Yes.

Q Which plan better protects incumbents?

A Well, as we've discussed earlier, the incumbents were better protected in the enacted plan than the alternative plan.

Q And, Mr. Morgan, is compactness a traditional redistricting principle?

A Yes.

Q Did you analyze the compactness of District 3 in the enacted plan and the alternative plan?

A Yes.

Q And is there a professionally accepted standard for judging whether a district is compact?

A No, not that I'm aware.

Q How do demographers in your field measure compactness?

A Well, there are a number of compactness tests that are run on districts, and those scores are compared.

JUDGE O'GRADY: Define core for me, just to make sure that I'm understanding your tab 14 here. What do you mean by preserving—what does the core mean?

THE WITNESS: Okay. The core is the population of the benchmark district. So you would look at what percentage of the population from the benchmark district is retained in the new district.

JUDGE O'GRADY: Democrats versus Republicans.

THE WITNESS: In this case, it's just the population. That's the measure that this percentage

is showing, so 85 percent of the population is retained from the previous district.

JUDGE DUNCAN: You are talking about movement relative to the benchmark, what stays closer to the placement of the benchmark.

THE WITNESS: Yes, Your Honor.

JUDGE PAYNE: It's an absolute number, not partisan by party either way.

THE WITNESS: Yes, Your Honor, that's correct.

Q Just maybe a quick hypothetical. So if the benchmark district is 500,000 people, and 400,000 of those people ended up in the new district, what would be the percentage of retention?

A That would be 80 percent. 400,000 out of 500,000.

Q And—

JUDGE PAYNE: You were on protection of incumbents.

MR. GORE: I think we've asked a couple questions on that.

JUDGE PAYNE: What's this tab?

MR. GORE: There's no tab for that. We talked about that already.

Q And, Mr. Morgan, again, which one better protects incumbents?

JUDGE PAYNE: I think he said that.

Q We're moving now to compactness, and, Mr. Morgan, is that a traditional redistricting principle?

A Yes.

Q And is there a professionally accepted standard for judging whether a district is compact?

A No, not that I'm aware.

Q How do demographers in your field measure compactness?

A There's a number of compactness tests that are run on districts, and those results can be compared.

Q And have you prepared a chart showing the compactness scores of enacted District 3 and alternative District 3 on two of those measures?

A Yes, I ran the compactness scores for some test for all of the districts.

Q And will you turn to tab 13 which is Intervenor Defendants' Exhibit 24. Is this the chart you prepared?

A Yes.

Q And what does this chart show?

A Well, in particular, you are asking me about District 3. It shows that in the enacted plan on the population polygon test, enacted District 3 is .54 and the alternative district is .53. So under that test, the enacted plan is more compact than the alternative plan.

Likewise, on the Ehrenburg test, District 3 is .25 in the enacted plan and .23 in the alternative plan. So under this test, the enacted plan is more compact than the alternative plan.

Q And did Dr. McDonald also prepare a chart showing these compactness scores on particular measures?

A Yes, he did.

Q And will you turn to tab 22, Plaintiffs' Exhibit 29. Will you turn to page seven of that report. Is this the chart that Dr. McDonald prepared?

A Yes.

Q And which compactness measures did he use?

A In this chart, he's using the Reock test, the Polsby-Popper test, and the Schwartzberg test.

Q And are those measures more reliable than the measures you used?

A No.

Q Do they measure different things than the measures you used?

A Yes, the compactness test measures different things.

Q What does Dr. McDonald's chart show about District 3 on the pre-measures in his chart?

A His chart in District 3, he shows a Reock score of .19 for the adopted plan and .22 for the alternative plan. So that's a difference of .03, and the Polsby-Popper plan is .08 in the enacted plan and .11 in the alternative plan. So under those two measures, the alternative plan is more compact.

Then on the Schwartzberg test, the numbers in the chart say 3.07 for the adopted plan, and the number in the chart says 2.04, but we have acknowledged that there was a correction to that, that the actual number is 2.61, and in the case of the Schwartzberg test, the lower number is more compact. So in this case, the Schwartzberg test, the alternative plan is more compact.

Q And are the differences on these measures between the enacted District 3 and alternative District 3 significant, in your opinion?

A No.

Q Why not?

JUDGE PAYNE: Under whose measurement test, or one used by Dr. McDonald?

Q So on the Reock score, you said there's a difference between the alternative District 3 and enacted District 3 of .03?

A The difference in the Reock score is .19 and .22, so the difference is .03.

Q And in your professional judgment, is that difference in scores on those measures significant?

A No. It's higher in one, but it's very close.

Q And how about on a Polsby-Popper measure?

A It's .08 and .11. It's .03 difference. It is different, but it's not significant.

Q And how about on the Schwartzberg measure?

A Well, that one shows a greater difference at .261, but this is a different scale, but there is a difference.

Q And is that difference significant in your professional judgment?

A I don't think so.

Q Do you have an opinion as to whether enacted District 3 or alternative District 3 is more compact?

A Well, as I point out in the other compactness scores, the enacted District 3 was more compact, and on these tests, the alternative district is more

compact, and these compactness measures are at odds. So I don't see how you could say one is completely more compact than the other.

Q Mr. Morgan, I want to ask you now about contiguity.

JUDGE PAYNE: Excuse me just a minute. In your profession, practice of your discipline, what is the difference between the measures that you used on the one hand and the measures that Dr. McDonald used on the other in your view?

THE WITNESS: Well, the compactness tests measure different things. Generally these compactness measures will compare the shape of a district to an idealized shape, like a circle or some combination of that.

Some of these tests also look at population compared to a different district shape or an idealized district shape. They measure slightly different things, and, again, some of these can be at odds with each other. There's a whole range of these compactness tests.

JUDGE PAYNE: Why did you choose the ones you chose to use in your table 11 in Exhibit 24 of the intervenor defendants?

THE WITNESS: Well, in the mapping software that I have, I think there are eight compactness tests, and those were two additional ones that just show that Dr. McDonald was asserting that the compactness of the alternative district was greater than the compactness of the enacted district, and I was showing some scores where that's not the case.

JUDGE PAYNE: All right.

Q Mr. Morgan, is contiguity a traditional districting principle?

A Yes.

Q Have you analyzed whether enacted District and alternative District 3 satisfy that principle?

A They are both contiguous.

Q And how are they both contiguous?

A Both the enacted plan and the alternative plan are contiguous over water without a connecting bridge.

Q And what is one example of where that's the case in alternative District 3?

A Well, you can see it on the map that's here. The map on the left shows the enacted district, and the map on the right shows the alternative district, and at the very top end of there, there's—Surry County connects across the James River to James City County, and there's no bridge at that point in the contiguity, but, again, both districts are contiguous.

Q Mr. Morgan, what is a split locality?

A A split locality is like a county or independent city that would be divided by a districting plan. So it would be split between district, say, A and district B.

Q And is avoiding split localities a traditional districting principle?

A Well, looking at the Senate criteria, they identify the localities as a community of interest on governmental jurisdictions, so split localities, avoiding splits could be a traditional criteria.

Q And does the Senate criteria say avoiding split localities was a principle entitled to any special weight?

A Well, the Senate criteria specifically said that they were entitled to no greater weight than any other community of interest.

Q Is it possible to avoid splitting localities entirely in a congressional redistricting plan?

A Well, it's possible, but it's not likely because of the zero population requirement.

Q Did the enacted plan improve on the number of split localities compared to the benchmark plan?

A Between the enacted plan and the benchmark plan, yes.

Q And do you recall how many localities were split in the benchmark plan?

A I think there were 19 split in the benchmark plan.

Q And how many in the enacted plan?

A 14 involving population.

Q And have you prepared a chart showing the number of split localities in the enacted and alternative plans?

A Yes.

Q Will you turn to tab 14 which is Intervenor Defendants' Exhibit 25. Is this the chart you prepared?

A Yes.

Q And what does this chart show about the number of split localities in the enacted plan and the alternative plan?

A This lists the localities, the counties and independent cities in the Commonwealth that were split in the enacted plan and the plaintiffs' alternative plan.

Q And do the enacted plan and the alternative plan split the same localities without affecting population?

A The—they split the same number of localities that affect no population on the bottom of the chart. There are three localities, Isle of Wight, James City, and Suffolk, that are split in both plans equally.

Q And is there any traditional districting principles against splitting localities in a way that does not affect population?

A Not that I'm aware of, and certainly not in my experience in Virginia.

Q In your professional opinion, is the fact the alternative plan splits one fewer locality than the enacted plan significant?

A In the chart, it shows there are 14 split localities in the enacted plan and 13 in the alternative plan. It's one fewer. It's not significant.

Q And is there any difference in the character of the split localities in the enacted plan and the alternative plan?

A Well, as we've discussed, when discussing the cores of districts, the enacted plan's split localities as regards to District 3, the enacted plan splits

Hampton and Newport News and Norfolk, Prince George, Henrico, and Richmond.

Those are all split in District 3. All of those have been split under the benchmark plan. In the alternative plan, the alternative plan does not split Hampton, does not split Norfolk, which were split under the benchmark plan, but it introduces a new split in Portsmouth, and that was a split that was not contained in the benchmark plan.

Q So by keeping splits in localities that were split in the benchmark plan, does the enacted plan preserve communities of interest?

A Yes. It preserves communities of interest that are formed around the benchmark districts, and it retained—it also helps explain why the enacted plan shows a higher retention of the cores, because it keeps some of the same splits that were communities of interest formed around the benchmark districts.

Q Does the alternative plan's split of Portsmouth split communities of interest?

A It splits a very small portion of Portsmouth away from District 3, and it creates a different community of interest.

Q Mr. Morgan, did you also analyze the number of split VTDs in the enacted plan and the alternative plan?

A Yes.

Q And does the enacted plan improve on the number of split VTDs as compared to the benchmark plan?

A The enacted plan improves on the number of split VTDs as compared to the benchmark plan, yes.

Q Do you remember how many split VTDs there were in the benchmark plan?

A I think 26, but I think it's in my report.

Q Sure. If you'd like to turn to your report which is tab two, Intervenor Defendants' Exhibit 13. I believe your discussion of this point is on page 21.

A Yes. There are identified 26 split VTDs in the benchmark plan.

Q And how many split VTDs are there in the enacted plan?

A There are ten split VTDs in the enacted plan involving population.

Q And in your experience, Mr. Morgan, is it possible to split fewer than ten VTDs affecting population in an 11th District Congressional plan such as the enacted plan?

A Not ordinarily because of the zero population requirement. You would expect that there would be some VTDs split, and at a minimum, one for each division of the district.

Q Since we're in your expert report, will you turn to page 22. Is this table here, table 13, a chart you prepared?

A Yes.

Q And what does this chart show?

A This chart shows the split VTDs in the enacted plan and the alternative plan.

Q And how many split VTDs are there in those two plans?

A Well, there are—they have the same number of split VTDs involving population. There are ten in the

enacted plan and ten in the alternative plan. There are some additional VTDs involving no population that are split differently in the enacted and alternative plan.

Q Mr. Morgan, I'd like to ask you a few questions about the plaintiffs' packing quota allegations. Can you turn to tab 32 which is Intervenor Defendants' Demonstrative 8. Mr. Morgan, what was the BVAP in benchmark District 3?

A The chart, it shows it's 53.1, 53.9 of the inclusive method in the benchmark district.

Q What is the BVAP in enacted District 3?

A 56.3.

Q And what is the difference in those two BVAPs?

A 3.2 percent.

Q Plaintiffs have alleged that this BVAP increase is a result of a quota or impermissible effort to attract black voters. Do you agree with that allegation?

A No.

Q What is the basis of your opinion?

A Well, as we've discussed before, the enacted plan is a bipartisan incumbency protection plan, and it has political considerations, and the preservation of cores explain how the plan was drawn, and in doing so, the black voting-age population increased.

Q And are you aware of any evidence in this case that moving this 3.2 percent BVAP from one district to another district would improve black voters' ability to elect candidates of their choice in the other district?

A Moving the three percent, not that I'm aware of.

Q And did this 3.2 percent increase in District 3's BVAP subordinate traditional districting principles to race?

A No, it didn't subordinate the traditional principles to race for the reasons I've discussed.

Q And have you seen any alternative plans in this case that preserve precisely the 53.1 percent benchmark BVAP and better comply with traditional districting principles in the enacted plan?

A I haven't seen an alternative that does that.

Q And did the General Assembly have reason to believe that this slight 3.2 percent increase in District 3's BVAP was impermissible?

A No. I don't think the General Assembly had reason to believe that this slight increase was impermissible.

Q What was the General Assembly's experience in 2011 with passing a plan for the House of Delegates?

A Well, based on the DOJ submission, the House of Delegates passed a plan in the House of Delegates that had 12 majority-minority districts, and the House of Delegates' districts in all of those 12 were 55 percent or higher in black voting-age strength, and in some cases, the black voting-age population was increased above the benchmark level, and that House of Delegates plan was passed with bipartisan support in the House of Delegates. It received the support of eight of 12 minority members, and also it was pre-cleared by the Justice Department.

Q And did the General Assembly in 2011 have alternative House of Delegates districting plans before it that preserve the majority black districts but at levels lower than 55 percent BVAP?

A Yes. The House of Delegates had alternative plans before it that had lower black voting-age strength. Again, this is—in the DOJ submission, they list some of those alternatives, but it shows the plan, that it was enacted and it was pre-cleared.

Q And did the General Assembly conduct a racial bloc voting analysis for the House of Delegates' plan?

A No.

Q And what is your opinion about this House of Delegates experience and how it relates to the enacted Congressional plan?

A Well, the House of Delegates experience, the members of the General Assembly had passed a plan. Again, the districts—the minority districts were 55 percent or higher in black voting-age strengths for all the districts, and as I said, it receives minority support in the legislative vote. So, you know, when it came time for the congressional plan, that might have been something the General Assembly would have looked at.

Q And are you basing that opinion on your personal knowledge?

A No.

Q What are you basing it on?

A The DOJ submission.

Q And while you were working on the House of Delegates plan, did anyone ever tell you there was a 55 percent BVAP quota for majority districts?

A No.

Q Did the General Assembly apply a BVAP quota when it drew the House of Delegates' plan?

A No.

Q And have you discussed the General Assembly's approach to complying with Section 5 in the enacted Congressional plan with any delegates or persons involved in drafting that plan?

A The Congressional plan? No.

Q And did the General Assembly apply a BVAP quota when it drew the enacted Congressional plan?

MR. HAMILTON: Object to the form of the question, the lack of foundation. The witness just said he doesn't know.

JUDGE PAYNE: Lack of foundation.

Q Based on the public records that you reviewed, did you receive any evidence that the General Assembly applied a BVAP quota when it drew the enacted Congressional plan?

A I haven't seen any evidence of that in the public record.

Q Have you reviewed the report of the independent commission on redistricting established by Governor McDonnell?

A Yes.

Q And was Dr. McDonald an advisor or consultant to that commission?

A Yes.

Q And did that commission perform a racial bloc voting analysis?

A No.

Q And what proposals did the commission make for the BVAP in Congressional District 3?

A I think there were three different proposals. One I think we've discussed was at 55 percent black voting-age strength. One was at 53 percent. I don't have the information in front of me.

Q And to your knowledge, did anyone criticize the commission for proposing to increase District 3's BVAP to 55.1 percent in one of its options?

A Not that I know of.

Q Based on anything you reviewed, did anyone say. to your knowledge, that the commission had used a 55 percent quota?

A No, not that I know of.

Q So, Mr. Morgan, based on everything you reviewed in this case, did the enacted plan subordinate traditional principles to race?

A No, for the reasons I've discussed earlier.

Q Would the General Assembly have had reasons to make the changes to District 3 under the enacted plan regardless of the race of the affected voters?

A Yes. As I discussed, preserving the core of the districts, the political considerations, and incumbency protection explain the plan. I looked at the 2008 presidential election in particular.

JUDGE PAYNE: I think he's been through all this, hasn't he?

MR. GORE: Yes. No further questions, Your Honor.

CROSS-EXAMINATION BY MR. HAMILTON:

Q Good morning, Mr. Morgan.

A Good morning.

Q Before we get into all the details here, let's just start with your—where you finished, and I think we're on common ground here, but let's see. You'll agree with me that in adopting the enacted plan, the General Assembly considered race; right?

A Well, I think that the General Assembly considered race—

Q The question is real simple. Yes or no, did they consider race?

A I think so. As it relates to, you know, compliance with Section 5 and Section 2, yes.

Q In fact, all else was secondary to that; right?

A I would disagree with that.

Q Do you have the notebook in front of you there?

A I have the witness notebook for the—it says Morgan Witness Binder. That's what I have.

JUDGE PAYNE: What exhibits are you referring us to, Mr. Hamilton?

MR. HAMILTON: Tab two in the witness notebook prepared by MR. Gore.

JUDGE PAYNE: The one we've been working out of.

MR. HAMILTON: That's correct, and for the record, it's Intervenor Defendants' Exhibit 13. It's Mr. Morgan's report.

JUDGE PAYNE: Okay. And the question is what?

Q Are you on page 25 of your report, sir?

A Okay.

Q In fact, you wrote that the Senate criteria treated compliance of the Voting Rights Act, including compliance with protection against unwarranted retrogression or dilution of racial or ethnic minority voting strength, as the highest priority for the enacted plan after compliance with the constitutional equal population guarantees; correct?

A I believe I was quoting the Senate criteria, yes.

Q Okay. And, in fact, were those Senate criteria applied in preparing the enacted plan, sir?

A Were the senate criteria applied in preparing the enacted plan? The Senate criteria were available. They may have been applied.

Q You don't know?

A I can't say for certain.

JUDGE DUNCAN: Are we talking about Plaintiffs' Exhibit 5, the Senate committee resolution that's in the—

MR. HAMILTON: We are, Your Honor. It's cross-referenced. I'm actually discussing at the moment his expert report which cross-references—

JUDGE DUNCAN: Yes. I was asking if my understanding of the cross-reference was correct.

MR. HAMILTON: You are exactly right, Your Honor.

Q All right. In 2011, the Democratic Senate enacted the Senate criteria or adopted the Senate criteria; correct?

A Yes.

Q That's when the Democrats controlled the Senate?

A Yes.

Q And then the enacted plan was adopted by the Republican-controlled legislature; correct?

A I believe the final passage was in 2012, in January, yes.

Q There is—the Republican legislature, after it took control, never readopted that plan; isn't that true?

JUDGE PAYNE: Never readopted what plan?

MR. HAMILTON: I'm sorry, the Senate criteria.

JUDGE PAYNE: Never readopted the criteria.

MR. HAMILTON: Correct. Thank you, Your Honor.

A I'm not aware that the Senate readopted the Senate criteria.

Q In fact, there's no evidence that Delegate Janis or anyone else ever referred to or applied, let's say referred to the Senate criteria in the legislative hearings concerning the adopted plan; isn't that true?

A I'm sorry. You are asking me about the legislative hearings?

Q Correct.

A I don't have all the legislative hearings in front of me.

Q Let's go back to your—let's talk about your background a little bit. You graduated with a BA in history from the University of Chicago; correct?

A Yes.

Q An excellent institution, but you didn't attend the University of Chicago Law School, and you're not a lawyer; right?

A No.

Q And I ask, because in various places in your expert report, you describe various Voting Rights Act or constitutional cases. That's all just background; isn't that right? You are not offering a legal opinion?

A No, I'm not offering a legal opinion. I look at cases on my own because they're relevant to drawing districts, and in this instance, I looked at some cases that were mentioned in the briefs or were relevant here.

Q The answer to the question is, you are not offering a legal opinion?

A I'm not offering a legal opinion.

Q Thank you. You don't consider yourself an expert in the Voting Rights Act, do you?

A No.

Q And, in fact, you've never taken a course in statistics; is that right?

A No.

MR. HAMILTON: It's not right?

JUDGE PAYNE: That's not right?

THE WITNESS: It is right. I'm sorry. I have not taken a course in statistics in college.

Q Now, I think you testified on direct examination yesterday that you worked on a number of other redistricting matters before getting involved in this litigation. Do you recall that testimony?

A Yes.

Q Sometimes you are hired by individual legislators; correct?

A Individual legislators basically representing a caucus of legislators. In some instances, it could be a single legislator, yes.

Q So the answer is yes, sometimes you are hired by individual single legislators?

A Yes.

Q Sometimes you are hired by legislative caucuses; correct?

A Yes.

Q In every one of those cases, you've been working for or been paid by the Republican legislators or caucuses; isn't that true?

A Well, again—

JUDGE PAYNE: That's a fairly straightforward question. Yes or no?

THE WITNESS: Legislators, yes. If you imply legislators at the county level, I've worked with entire counties, but legislators, yes. Generally I'm retained by Republican members, yes.

Q People who pay you are Republicans?

A Yes.

Q You've never been paid by a Democrat legislator or caucus?

A No.

Q And it's fair to say, as you put it in your deposition, you generally work on the Republican

side of the equation in redistricting. That's fair, isn't it?

A Generally, and, again, as I said also in my deposition, there are times when I work with Democrats as well.

Q Worked with Democrats. You've never been hired by a Democratic legislator or caucus?

JUDGE PAYNE: We've been there and done that.

THE WITNESS: Correct.

JUDGE PAYNE: Please understand, I think we're listening. We may not look like it, but we are.

Q Sir, you testified you were involved in assisting with redistricting in the House of Delegates in 2011/2012?

A Yes.

Q You actually drew some of those plans?

A Yes.

Q Paid about $25,000 for your work?

A That sounds about right. It might have ended up being a little more than that.

Q And you were hired in that instance by the Republican caucus; right?

A I was hired by attorneys for the—I was hired by Chris Marston who is an attorney for the Republican caucus. I worked closely with delegates in the House, if that answers the question.

Q In fact, you reported to Mr. Marston?

A I reported to Mr. Marston and the delegates. I worked very closely on this project with the delegates directly.

Q I believe you testified that you didn't work with any members of the Virginia General Assembly on its Congressional plan in either 2011 or 2012; did I hear you correctly?

A On the Congressional plan, I wasn't part of the Congressional redistricting process.

Q So you didn't work with any members of the Virginia General Assembly on the Congressional plan in 2011 or 2012; yes or no?

A I didn't work on that, no.

Q And you didn't work with any staff on the Congressional plan; correct?

A No, I didn't work on the Congressional plan.

JUDGE PAYNE: I think he said it in direct and several times now. He didn't work on the Congressional plan. I think we got that.

Q So you don't have any firsthand knowledge working on the Congressional plan about what Delegate Janis did or did not intend?

A No.

Q You don't have any knowledge from anyone else in the General Assembly about the intention behind the enacted plan?

A The Congressional plan, no. I saw Delegate Janis one time in 2011, and he was on his way out to seek a county office. The last time I saw him.

Q In preparing your report, which is Intervenor Defendants' Exhibit 13, let's talk about what you did or didn't do in preparing that report. First of all, I take it you didn't talk with any of the legislators who actually prepared the map including Delegate Janis?

A I didn't—I mentioned in my deposition I had one conversation with Delegate Bell to ask him to get the Department of Legislative Services data that had been requested in this case, and that's the only contact I had with any members regarding the Congressional plan, and even in that case, we didn't speak of anything about that.

Q No email, no phone calls, no texts—

JUDGE PAYNE: I think none means none.

MR. HAMILTON: I'm sorry?

JUDGE PAYNE: None means none. You don't need to enumerate what all could possibly be encompassed by the word "none." We'll take it at face value.

Q You also didn't—in preparing your report, you didn't call any of the staff members or Mr. Marston or anyone else to ask about considerations that went into preparing the enacted plan; correct?

A No.

Q You actually knew all these people and knew their phone number, but during the preparation of your report, that wasn't something you thought was necessary to do?

A That wasn't something I thought was necessary to do.

Q Fair to say that you—it is fair to say, isn't it, that you actually, from personal knowledge, don't know why the General Assembly increased the BVAP in CD 3, using the exclusive method 56.3, or the inclusive 57.2 percent; you don't know?

JUDGE O'GRADY: Other than the public record?

JUDGE DUNCAN: He said from personal knowledge.

JUDGE O'GRADY: Personal knowledge?

MR. HAMILTON: Personal knowledge is what I'm asking.

A I don't have personal knowledge of that. What I analyzed in my report and what I've testified to is information in the public record, in particular the DOJ submission which I looked at.

Q You don't really know what the General Assembly intended by drawing the plan one way or the other based on the public record—or other than based on what your report says?

JUDGE PAYNE: I think he's answered that before. Let's go on. Let's focus on what really is important to you. He's answered several times what he didn't do.

Q Sir, let's talk about the legislative record. You know there's a transcript of a hearing before the General Assembly. That's a public record; correct?

A Transcript of the hearing before the General Assembly, yes.

Q You didn't look at the transcripts of the hearings before the public—that are in the public record in the course of preparing your report; isn't that true?

A I didn't reference any of those hearing transcripts in my report.

Q And other than those—

JUDGE PAYNE: Excuse me.

JUDGE DUNCAN: I didn't understand that to be responsive. Could you repeat your question so I make sure I follow.

MR. HAMILTON: Thank you, Your Honor.

Q My question was, in preparing your report—

JUDGE DUNCAN: Did you look at was your question. You said did not reference.

MR. HAMILTON: Okay, thank you.

Q Did you look at or review any of the legislative record other than what might have been attached to the briefing that the lawyers have filed here?

A I looked at the DOJ submission, and I understand that there are hearing transcripts. I didn't look at them for my report.

Q Thank you, sir. You also didn't conduct a racial bloc voting analysis?

A No.

Q You know the term? You know what it is?

A Yes.

Q It's an important factor in any Section 5 case. You agree with that; right?

A I assume it can be, yes.

Q And you agree that it's an important thing to do when a legislature undertakes a redistricting effort?

A Well, I'm sure it can be, but, again, as far as I can tell, the General Assembly did not include a racial bloc voting analysis with its DOJ submission.

Q In fact, you, yourself, have never conducted a racial bloc voting analysis at any time in any context; right?

A Not as that's understood, that's correct.

Q In your deposition, you commented it seemed like a very complicated process?

A Yes.

Q The fact is, you don't know how to do a racial bloc voting analysis, just not something you do.

A It's not something I do, no.

Q So as a result—we can look through your report, but there's nowhere in your report where you analyze the minimum number of black voting-age population residents needed to allow black voters to elect candidates of their choice in the enacted CD 3; correct?

A That's correct.

Q So as you sit here today, you can't tell us and you won't be offering an opinion, you haven't offered an opinion about whether or not African-American population in CD 3 could have elected their candidate of choice with 53 percent BVAP. We just don't know that.

JUDGE PAYNE: Those are two different questions. One is whether he's going to testify. Now it's whether you know it. So do you want to break it up?

MR. HAMILTON: I apologize for the inarticulate question, Your Honor.

Q As you sit here today, you can't tell us whether or not the African-American population in CD 3 could

have elected their candidate of choice with a 53 percent BVAP?

A I'm not testifying to that. I cannot say that today.

Q And you can't say whether or not they could have elected their candidate of choice with 50.1 percent as in the alternative plan; correct? You don't know the answer to that because you haven't conducted a racial bloc voting analysis?

JUDGE PAYNE: Doesn't that follow from not having conducted the racial bloc voting analysis and from what he said before?

MR. HAMILTON: It might, Your Honor. I'm not sure. I want to make sure this witness and I are not in disagreement. I just have two or three questions on this.

A For the same reasons, yes. I don't have an opinion on that.

Q And not to belabor the point, but if we flipped around the other way, we could go up to 55 or to 57 percent BVAP, and you still wouldn't be able to tell us do they have the ability to elect, because in the absence of a racial bloc voting analysis, we just don't know; isn't that right?

A Again, the question is a little complicated as you've described it to me, but following the vein of your questioning, I agree.

Q Thank you. Now, you didn't analyze whether white portions of communities were split apart and not included in CD 3; correct?

A White portions of communities were split apart and not included in CD 3?

Q Yes, sir.

A I guess I didn't analyze that.

Q Do you recall—you were an expert in the Fayette County case in Georgia?

A Yes. It was the Fayette County case in Georgia. I was an expert for the defendants. I filed reports in that case.

Q Earlier this year.

A Yes. Well, actually in 2013 was the initial. There was some last-minute reports filed in 2014, yeah.

Q Thank you. If that happened, if white portions of communities were split apart and not included in CD 3, that could be evidence of not paying heed to traditional redistricting principles; right?

A If white portions of communities were split apart from communities in general?

Q You agree that if it's necessary to split out white population from a district or from communities in order to create a majority-minority district, that's evidence of not paying heed to traditional redistricting principles; isn't that true?

A You are asking me about the Fayette case?

Q I'm asking you about the general proposition.

A In general terms, it could be if there's not some other factor that accounts for the differences.

Q And that was one of the factors that you looked at in the Fayette case; correct?

A In the Fayette case, I was not looking—

Q Yes or no answer. That was one of the factors you looked at in the Fayette case; isn't that true?

A Yes, in addition to other factors.

Q Thank you. In fact, you relied on that factor, among others, to conclude that race was a predominant factor in a Section 2 case in Fayette County, Georgia; correct?

A Again, among other factors including population

equality. There was—

JUDGE PAYNE: Is your answer to begin with yes or no?

THE WITNESS: It was one of the factors, yes.

Q You didn't analyze that factor here in your report; correct?

A I didn't analyze that in my report. Dr. McDonald had looked at the—

Q The question is whether you analyzed it in your report.

A No, I didn't analyze that in my report.

Q Thank you. Now, in that case, you looked at compactness; true?

A In the Fayette County case, compactness measures were run. We looked at that, yeah.

Q And you used a couple of the same factors, same tests that were used in this case; correct?

A Yes. There were, I think, three tests used in the Fayette County case—

MR. HAMILTON: Your Honor, I move to strike. The question was yes or no. He answered the—

JUDGE PAYNE: Just try to answer the question as best you can, and if they need to follow up with the explanation, they'll do that on redirect.

Q In the Fayette case, you used the Reock test; correct?

A Yes.

Q You used the Polsby-Popper test; correct?

A Yes.

Q You said they complement each other; correct?

A I did say that in that case, yes.

Q You didn't use these other tests that you mentioned this morning in your deposition testimony; do you recall that?

A I used another compactness test, and they weren't the two that were in the report.

Q And I believe in response to questions from the Court, you testified that—I think the Court asked why did you choose the tests that you chose, and did I understand you to say you chose—you looked through all the eight tests to try to find some that came out differently than Mr. Morgan so you could make the point that compactness sometimes varies depending on these tests. Is that the purpose of identifying those alternative tests?

A Well, there were two alternative tests, and there were eight in the program. I suppose I could have looked at all eight. Three of them were included. I included two additional ones.

JUDGE PAYNE: Listen to the question. He's asking you why it was you chose to use those, and in particular he's saying did you choose to them simply

for the purpose of showing that different measurements would produce different results. Isn't that your question?

MR. HAMILTON: Exactly.

A Yes, different measures produce different results, yes.

Q The enacted plan—changing subjects here a little on you. The enacted plan splits up Newport News between CD 2 and CD 3; correct?

A The enacted plan, Newport News, yes.

Q The same is true of Hampton. The enacted plan splits Hampton between CD 2 and CD 3.

A Yes.

Q It's true, isn't it, that the racial split of those portions of Newport News into those districts could be telling of whether race was a predominant purpose. Could be telling. Isn't that true?

A It could be, but I haven't seen that in any report.

Q Do you recall—you agree it's relevant and it could be telling; right?

A It could be telling, but, again, I haven't seen that in any report.

Q You can look at the plans, but—and you may not have seen that in any report, but you didn't talk to anyone in the legislature about that treatment of Newport News or Hampton.

A I didn't talk to anyone in the legislature about the treatment of Newport News and Hampton, that's correct.

Q Now, you are not offering the Court an opinion on whether CD 3 is narrowly tailored in a constitutional sense under the *Shaw v. Reno* case; correct?

A I'm not offering that opinion.

Q You are not familiar with the concept of narrow tailoring?

A I've learned a little more about it, but as a legal doctrine, I'm not offering an opinion on that.

Q In your report—let's see. Yesterday you testified, or maybe it was this morning you testified that you worked with members of the General Assembly on the House of Delegates' districting plan; correct?

A Yes.

Q And in your report, you discuss the House of Delegates' plan; right?

A I discuss the House of Delegates' plan from the DOJ submission, yes.

Q Let's have you look at—it's in the witness notebook in front of you. It's tab two.

MR. HAMILTON: And for the record, it's Intervenor Defendant Exhibit 13 at page 26. If I might ask that the ELMO be turned on, Mr. Neal.

JUDGE PAYNE: What page are you on, Mr. Hamilton?

MR. HAMILTON: 26 and 27, Your Honor. If we could zoom in on the highlighted text.

Q All right. Now, you state that the Virginia's enacted plan for the House of Delegates, and I quote, had a black VAP of above 55 percent in all 12

majority black districts, close quote. Did I read that correctly, sir?

A That is the first highlighted one. Yes, that's correct.

Q And then you further explain that the General Assembly, quote, enacted a House of Delegates' districting plan with a 55 percent black VAP as a floor, close quote. Did I read that correctly?

MR. GORE: Objection, Your Honor. I believe he's misquoted it. He needs to read the entire quote.

JUDGE PAYNE: What paragraph are you on?

MR. HAMILTON: It's the second—let's see, in the paragraph—

MR. GORE: Second highlighted portion, Your Honor.

JUDGE PAYNE: I can't see the highlighted portion. We don't have the screens up here.

MR. GORE: The paragraph on the bottom that starts "Thus."

THE COURT: Thus is where we are, and your objection is that he did not read correctly—

MR. GORE: Mr. Hamilton didn't read the portion of line one that says "with strong support of bipartisan and black legislators."

MR. HAMILTON: I'm happy to read the entire quote, Your Honor.

JUDGE PAYNE: All right.

Q So we'll start from the beginning, read that sentence. "Thus, the General Assembly enacted, with strong support of bipartisan and black legislators, a

House of Delegates' districting plan with a 55 percent black VAP," which means voting-age population, "as the floor for black majority districts subject to Justice Department preclearance under Section 5 including districts within the geography covered by Congressional District 3." Did I read that correctly, sir?

A Yes, that sentence is in the report.

Q Floor means a minimum number. That's what floor means in the way you used it; right?

A Well, after—

Q Yes or no, sir?

A Yes.

Q Let's return to your report. Let's look for a minute at the last sentence on page 26, and, again, it breaks on to page 27, and the last sentence says, and I'll read it, "The General Assembly, therefore, had ample reason to believe that legislators of both parties, including black legislators, viewed the 55 percent black VAP for the House of Delegates' district as appropriate to obtain Section 5 preclearance, even if it meant raising the black VAP above the levels in the benchmark plan." Do you see that?

A Yes.

Q Continue reading to the next sentence. "The General Assembly acted in accordance with that view for the Congressional districts and adopted the enacted plan with a District 3 black VAP at 56.3." Did I read that correctly?

A Yes.

Q When you say "that view" in that last sentence, the General Assembly acted in an accordance with

that view, that's a reference to the previous sentence of 55 percent black VAP was appropriate to obtain Section 5 preclearance; right? That's what you meant by that?

A Well, again, my statement was that the General Assembly had ample reason to believe that legislators of both parties viewed that.

Q That's what you meant by "that view"?

A Again, I'm saying that there was information before—

JUDGE PAYNE: I think the question is, do you know what the term—when you say "that view" in the last sentence of that paragraph, what view are you referring to? Read the sentence that you are referring to or the view you are referring to is all he's asking, I think.

THE WITNESS: Okay.

JUDGE PAYNE: Is that it?

MR. HAMILTON: That's it, Your Honor.

JUDGE PAYNE: What view are you talking about?

THE WITNESS: That the legislators viewed the 55 percent black voting age as appropriate to obtain Section 5 preclearance, and, again, I had established previously that this information came from the DOJ submission, and the previous sentence—

MR. HAMILTON: Strike as nonresponsive, Your Honor.

JUDGE PAYNE: Again, we'll not pay attention to that.

Q The simple fact is that the General Assembly found appropriate a 55 percent floor; right? We can argue about whether that's right or wrong, but according to your report, that's what your conclusion is, that they found—

MR. GORE: Objection, Your Honor. That mischaracterizes the testimony and the report. Mr. Morgan hasn't purported to say what the General Assembly found.

MR. HAMILTON: Your Honor, I think he actually did—

JUDGE PAYNE: The report speaks for itself and we can pretty well read that, what it says, I think, and to the extent the report is quoting somebody or somebody else, we can figure that out.

MR. HAMILTON: Thank you, Your Honor.

Q The fact is, based on your research and your report, no racial bloc voting analysis had been done by the General Assembly. You know that?

JUDGE PAYNE: I think we all know that by now. Really and truly, can we stipulate that there was no racial bloc voting analysis?

MR. HAMILTON: I certainly stipulate that.

JUDGE PAYNE: By this witness or by the General Assembly that we know about and move on. Turn mother's picture to the wall on this and go. Let's go.

Q Can I turn your attention to tab 35 in the notebook.

A In my notebook here?

Q In the witness notebook that's in front of you.

A Sure.

JUDGE PAYNE: That's Intervenor Defendants' Demonstrative 11.

MR. HAMILTON: That's correct, Your Honor.

JUDGE PAYNE: All right.

Q Yesterday afternoon you testified with respect to the population swaps. I think you also talked about that this morning between the various Congressional districts that are displayed on this table. Do you recall that testimony?

A Yes.

Q For each swap you compared two things: The black voting-age population change as a result of the swap and the change in political performance as a result of the swap. Do you recall that testimony?

A Yes.

Q In three of the four instances, you concluded that the difference was essentially the same; do you remember that?

A Yes, in that the political—yes. As I understand your question, you are saying that the politics and the racial components were similar. I concluded that, yes.

Q And with respect to three of these four swaps?

A Yes.

Q You'll agree with me that this isn't evidence that politics predominated the decision. At best, if we were to agree with your approach and your analysis, that at best, this is evidence that these swaps could be explained either by race or by politics;

right? They are essentially the same. We can't tell which predominated over the other?

A I'm not sure I would agree with that as you are stating it.

Q Okay. If the swaps are essentially the same with respect to the impact on race and the impact on politics and that were our only evidence, we can't tell whether race or politics predominated; isn't that true?

MR. GORE: Objection, Your Honor. We can't tell, it's ambiguous. I don't understand the question.

JUDGE PAYNE: You object to the form of the question?

MR. GORE: Form of the question.

JUDGE PAYNE: Why don't you rephrase to get where you are trying to get.

Q I'm simply trying to point, and maybe it's obvious and I might be beating a dead horse here, but if you are comparing these swaps, I think the point that you made yesterday was that the impact on politics and the impact on race was essentially the same. Isn't that the point you made yesterday?

A That they were—yeah, they were very similar. They were correlated, yes.

Q So if we wanted to discern, like I believe this Court is going to have to, whether or not race predominated over other factors, this doesn't help us one way or the other. It doesn't explain that it was politics predominating over race. At best, it just shows it's neutral; isn't that true?

A I could agree with that.

Q Thank you. So we'd have to look at other things in the record in order to draw the conclusion, like you've done in your report, to draw the conclusion about whether race predominated or not?

A I feel like I should say more on this, but I won't.

JUDGE PAYNE: Mr. Gore will make a note. You can follow up with it if you need to follow up.

Q You testified yesterday about the data set that you received from Dr. McDonald; do you recall that testimony?

A Yes.

Q You said it was flawed because it contained 2012 VTD data set instead of the 2010 VTD data set; do you recall that?

A Among other flaws, yes.

Q And you included 2012 political data in your analysis, didn't you?

A Yes.

Q And you're going to have to use the 2012 VTD set or make some adjustments if you're going to overlay the 2012 political results on the VTD data set; isn't that true?

A Yes. The data set that I used for this was de-allocated to the bloc level and, therefore, would have been allocated back into the districts and accounted for that variance. That is, the 2012 precincts were broken down and then reset into the 2010 VTDs for this analysis.

MR. HAMILTON: Move to strike, Your Honor. I didn't ask him what he did. The question is—

JUDGE PAYNE: I think it's a fair and responsive answer to your question. Overruled.

Q The fact is, the VTDs changed between 2010 and 2012; right?

A Yes.

Q Because of all the splits in the enacted plan among other things?

A There's many reasons the VTDs change. The enacted splits are only one factor. There are many more VTDs in 2012 than 2010.

Q Now, you mention that you made a mistake; do you recall that?

A Yes, I discussed that, and it was discussed previously, and as soon as it was brought to my attention, I offered a correction.

Q The mistake was in coding certain VTDs as to whether they were or were not in the benchmark Congressional District 3; correct?

A Again, yes, using the NCEC data which was—

Q Sir, I'm not asking you that. The mistake was in coding certain VTDs as to whether they were or were not in the benchmark CD. That's the mistake you made; isn't that true?

A Yes.

Q And you were coding those so that you could prepare what later became Intervenor Defendants' Exhibit 50; right? That's why you were doing that coding, to create that analysis?

A Not precisely. I was doing this coding also to verify and re-create Dr. McDonald's tables.

Q Okay. And the purpose was to compare what was in enacted CD 3 to what was in benchmark CD 3 to either dispute Mr. McDonald's table or create your own competing analysis; right?

A Again, I was trying to track the—the VTDs, as they were in the NCEC data set, which were not the VTDs in 2010, I was trying to track those which, again, was not included in the data set that was sent. So I was doing my best job to deal with the 2012 VTDs as they related to the enacted and alternative plans.

Q The data that you received from Dr. McDonald didn't contain benchmark indicators, whether particular VTDs were in or out of the benchmark; right?

A No. The data set included the 2012 VTDs. They had information on just the enacted districts, and that was it. And also, there's lots of other information there.

JUDGE PAYNE: Excuse me, just a minute, Mr. Hamilton. If your point is something to do with this notion, then it's okay to continue it, and that is this: If your point is to say that the mistake he made has an impact other than he's testifying to, then you can go on with it.

Otherwise, he's testified on the basis of the corrections, so it doesn't make any difference whether he made a mistake. He, like every other expert, makes mistakes, and even judges make them.

MR. HAMILTON: Of course. So do lawyers.

JUDGE PAYNE: Are you going to try to go somewhere else with it?

MR. HAMILTON: Of course.

JUDGE PAYNE: Okay. Well, get there, because we're having trouble following you focusing on just the mistake.

MR. HAMILTON: And I'm sorry. I think I'm arguing with the witness here a little bit because I'm trying to get a simple piece of foundation for where I'm going.

JUDGE PAYNE: Just ask the question, and if he has a problem, he will tell you.

Q You miscoded the entire city of Petersburg, didn't you?

A Yes.

Q That's what you were talking about yesterday?

A Yes.

Q So if we were to look at, and I won't take the Courts' time, but Exhibit 56 is an extract from the data set that you produced to us the day before yesterday that demonstrates the error, we could look at that.

A Could I see that, please? I have not seen that.

Q Take a look at Plaintiffs' Exhibit 56.

A I don't know if that's in my binder.

JUDGE PAYNE: Do you have any of those binders over there, Mr. Clifton? Plaintiffs' Exhibit what?

MR. HAMILTON: 56.

JUDGE PAYNE: In the second volume of the Plaintiffs' Exhibits near the back. My 56 just has—oh, I see. It's behind the disk. Do you see that?

THE WITNESS: Are these by tabs?

JUDGE PAYNE: Yeah, there's a tab on the right-hand side, and it's all the way near the back. The whole thing to the back. Is there no tab on there?

THE WITNESS: There's a tab. Which exhibit, please?

Q Let's start with Exhibit 54. It's one in a plastic sleeve.

A Exhibit 54, the exhibit list stops at 53.

Q If you flip the binder over—don't look at the index—you'll find it.

A Okay. So it wasn't in the contents.

Q That's correct.

A Okay.

Q And why don't you pull that out. It's in a plastic sleeve.

A Okay, sure.

Q You recall providing data set the day before yesterday?

A I recall providing a data set that was the NCEC data with some additional information, yes.

Q That was the data set that you had added some additional information. This is where the mistake was made. I don't want to belabor that, but this is a printout of the entire database which shows the coding where you coded it whether it was inside or outside the benchmark; right?

A It shows that among other things.

Q Sure. There's a lot things on here. Exhibit 56, which we were originally looking at, is simply a

blowup of the Petersburg precincts to show how those were coded. So if we were to look at—

A I don't have that exhibit in front of me. May I see that, please?

JUDGE PAYNE: Let's don't get testy with each other. 56 is near the back, and there are two parts to it. One is a disk, and the other part is a printout.

THE WITNESS: Okay, thank you. Now I see that, yes.

Q And you can look either at Exhibit 54, which is the big, long spreadsheet, but at my age it's hard to read things that small, or you can look at 56 which is simply a screen shot of one part of that. One way or the other, you can look at it.

A I see that exhibit. I see it.

Q And this is the seven—if we look at Petersburg, you'll agree with me that you coded those as being in benchmark CD 3?

A Yeah.

Q That was the mistake?

A That was one of the mistakes, yeah.

Q And you created this corrected Exhibit 50 after you realized that you made that mistake?

A Yes.

JUDGE PAYNE: He created Exhibit 50?

MR. HAMILTON: Corrected Intervenor Defendants' Exhibit 50.

JUDGE PAYNE: After he realized he made that mistake.

MR. HAMILTON: That's right.

THE WITNESS: Yes.

Q And what you did with corrected Intervenor Defendants' Exhibit 50 was simply correct this mistake. I think you said there was one other one that you caught as well?

A Yes, there was one other one.

Q And you corrected those mistakes and then recreated Intervenor Defendants' Exhibit 50?

A Yes.

Q Is that accurate now to the best of your knowledge?

A Yes.

Q Are you familiar with the Suburban Park VTD in Norfolk?

A Yes.

Q That was in benchmark CD 3, wasn't it?

A Yes.

Q But in your coding on your spreadsheet that you used to create corrected Intervenor Defendant Exhibit 50, you didn't have a benchmark assignment at all for that?

A For Suburban Park?

Q In Norfolk.

A Okay. Then I guess there's another error.

Q Can you confirm that?

A Sure.

Q Same is true for Richmond city, 309?

A That I'm not sure about.

Q Take a look at the exhibit.

A So the problem is, Richmond renumbered its VTDs between 2010 and 2012. So without actually going to the geographic software, I'm not sure whether 309 is in or out of the district. It's a totally different data set. This NCEC data is the 2012, and Richmond renumbered its VTDs, so I can't actually say with just the number whether it's in or out. I would need the geographic software to verify that.

Q My question wasn't whether it's in or out. The question is, you didn't provide any designation for it in the coding; isn't that true? You can look at Exhibit 54, which is the entire data set, if you'd like to confirm that.

A Well, the way I would view it is, if there's no designation, then it would be not in District 3.

Q There is—okay. You didn't include a designation. You concede that?

A I did not include a designation, and to my point, I don't know because I don't have the geographic software in front of me.

Q Fair enough. And the same is true for the Willard VTD in Norfolk; right? You didn't provide any kind of benchmark designation for that one either.

A I disagree with that.

Q Okay. All right, so there were additional—

JUDGE PAYNE: What?

MR. HAMILTON: I'm just moving on.

JUDGE PAYNE: He was answering your question.

MR. HAMILTON: Oh, I'm sorry. I thought he did answer my question. He said he disagreed.

A I disagree with that, because there are two VTDs named Willard in this data set which gets to my point I brought up before that there are—

JUDGE PAYNE: Because there are two different names.

THE WITNESS: Yes. There's Willard and Willard. They are both in the set.

MR. HAMILTON: Your Honor, at this point I just move to strike.

JUDGE PAYNE: Well, I understand, but he was in the middle of his answer, and I think you've answered enough now. Mr. Gore can pick that up if he needs to.

Q Let's look at the Intervenor Defendants' Corrected Exhibit 50. This is the document, after you've gone through this analysis, that you believe corrected the mistakes that you generated; right?

JUDGE PAYNE: Is that in the—it's in another notebook, isn't it?

MR. HAMILTON: I actually think it's in the witness notebook.

JUDGE DUNCAN: Tab 17.

JUDGE PAYNE: Yes, it is.

THE WITNESS: In the witness notebook.

JUDGE PAYNE: In the witness notebook. It's tab 17.

THE WITNESS: Okay.

Q So this is a table that you prepared?

A Yes.

Q In order to address the VTD analysis prepared by Dr. McDonald; correct?

A Yes.

Q And the headings are a little confusing, but let's take a look at them. The far right-hand column is entitled "In localities adjacent to enacted District 3." Do you see that?

A I see that.

Q We might consider that to be, at least the way Dr. McDonald was using it, it's kind of the pool, the pool of available precincts that we were selecting from, and then you were going to compare in the next column over the VTDs that were actually added into the plan; isn't that true?

MR. GORE: Object to the form. He can't comment on what Dr. McDonald thought about this.

JUDGE PAYNE: Why don't you ask him what he meant by it.

Q What did you mean by "in localities adjacent to enacted CD 3"?

A What I meant was what Dr. McDonald meant. In his report, he identified specific localities that were adjacent to District 3. They did not include two localities that were in District 3, it did not include two localities that were adjacent to District 3 as discussed in his report. In addition—

MR. HAMILTON: Your Honor, this is not responsive to the question.

JUDGE PAYNE: Well, I'm not sure you didn't ask it in such a way as to open it up.

MR. HAMILTON: Okay. Go ahead.

A To verify, I'm not making any statement about whether I agree with the characterization of localities adjacent to enacted District 3 as a pool of precincts. I'm replicating Dr. McDonald's report so that I could verify his numbers.

JUDGE PAYNE: I think you answered it now.

Q So the next column over, which is entitled "In enacted District 3 but not in benchmark three," those are the ones that you've identified—the purpose of this column is to identify those that were selected; correct? Selected and included in enacted District 3.

A I don't know about selected. I would say that I represent that they were included in the enacted district but were not in the benchmark.

Q So the idea of your table here, Corrected Exhibit 3, was to examine the racial composition and political performance of the various precincts added to CD 3?

A No.

Q Correct?

A No.

Q Well, if we look at it in the middle line, the 65.4 on the far right-hand column of average Democratic vote performance, that is what Dr. McDonald—that's a copy from Dr. McDonald's report; correct?

A No.

Q That number?

A No.

Q You added the Democratic performance?

A Yes.

Q And the 65.4 average Democratic vote percentage represents the average Democratic vote percentage in localities adjacent to enacted District 3, at least as described by Dr. McDonald?

A Yes.

Q And then if we look one box over to the left, there's a number 77.6; do you see that?

A Yes.

Q That's the average Democratic vote percentage of the VTDs in enacted CD 3 but not in benchmark CD 3?

A Yes.

Q And so if we compare those two, and I believe you did this on your direct examination, your point is at least if we use this analysis, this analytical structure of the VTDs in localities adjacent to enacted District 3 as described by Dr. McDonald, the enacted plan picks the more Democratic ones.

A I would disagree with the word "pick" because you are implying that all of the Democratic VTDs in the adjacent districts were available to be, quote unquote, picked, and as I've discussed, they are not nearby. Some of these are 30 miles away.

Q We're going to talk about that in a minute, but for the moment, forget the word "picked." Say "added." As it somehow ended up, whether they were selected or not, whether they were picked or not, they somehow ended up in the enacted plan, and the ones that ended up in the enacted plan, according to your analysis, reflected an average Democratic vote percentage of 77.6 percent; correct?

A Yes.

Q Thank you, sir. Now, the line down below that, the next line down, the average BVAP percentage here in the far right column, average non-Hispanic black voting-age population percentage in localities adjacent to enacted CD 3, 43.5 percent; correct?

A Yes.

Q And those that somehow made it into the enacted CD 3 but that weren't in the benchmark CD 3, that average non-Hispanic black voting-age population jumped to 56.3; correct?

A I think you mixed up the columns, but it's 43.3 is the number on the bottom right chart.

JUDGE PAYNE: 43.5.

A 43.5, and then in the enacted but not in the benchmark, 56.3.

Q The ones that ended up in the enacted plan had a higher concentration of black voting-age population?

A That's what the chart shows, yeah.

Q The difference between these percentages, if we look at the difference between 77.6 and 65.4, and I don't mean this to be a math test, but that's about a 12.2 difference; right?

A It is a 12.2.

Q The difference between 56.3 and 43.5 is 12.8 percent difference; correct?

A Yes.

Q Your analysis doesn't really tell us whether race or politics predominated here, just looking at that, at this corrected Exhibit 50. Can't really say

politics predominated, can't really say race predominated; right?

A Okay.

Q Now, one of the things that's not on this chart is VTDs that were in benchmark CD 3 but that somehow got dropped or were not—didn't end up in enacted Congressional District 3; correct? That's not reflected in this chart?

A I don't think it's reflected in this chart.

Q You looked at what was included but not what was excluded from the benchmark.

A Well—

JUDGE PAYNE: Those are two different questions.

MR. HAMILTON: Let me break it in two then.

Q Which chart shows us what was included in enacted District 3 but not benchmark District 3? That's the third column; right?

A Yes.

Q And it does not include what was in benchmark three but not in enacted District 3.

A Right. I don't have that data in this table.

Q Thank you. All right. I think you testified this morning that the alternative plan, you were comparing the alternative plan and the enacted plan and how they complied with traditional redistricting criteria. Do you recall that?

A Yes.

Q And one of the criteria is compactness, and I think you already talked about that?

A Yes.

Q At least if we use the Reock and Polsby-Popper test that you've used yourself elsewhere, the enacted plan is the least compact of all the—the enacted CD 3 is the least compact of all the adopted Congressional districts as measured by those two tests; correct?

MR. GORE: Object to form. He said at least. I'm not following the question.

MR. HAMILTON: Strike the word at least.

Q As measured by those two, CD 3 is the—has the least—is the least compact district of all the adopted Congressional districts in the plan; is that true?

A I would have to look at that. Is there a chart? We looked at my chart. Can I look at that chart again?

Q Of course.

JUDGE PAYNE: Do you want his—are you asking him about his measurements or Dr. McDonald's measurements?

MR. HAMILTON: I believe they're the same, Your Honor.

THE WITNESS: Dr. McDonald's measurements are the ones I would be referring to. So I'm looking for Dr. McDonald's report, I guess?

MR. HAMILTON: That's right.

JUDGE PAYNE: What is it? What tab is it?

MR. HAMILTON: Give me just a moment, Your Honor. I'll find it.

THE WITNESS: It's in my binder. It's tab—somewhere between Exhibit 27 and 30.

MR. HAMILTON: It's Plaintiffs' Exhibit 27.

THE WITNESS: Which is tab 20 on my binder.

Q At page seven, and in the witness notebook, it's tab 20.

A So you are asking me to agree that District 3 is the least compact—

Q I'm going to limit the question to the two tests that you used in Fayette County, Georgia, the Reock and Polsby-Popper test. But under those two tests that you used, you'll agree with me that CD 3 is the least compact of all the adopted Congressional districts in the enacted plan?

A Okay, so—

Q We're not disagreeing with that?

A I want to verify it. Under the Polsby-Popper, District 3 is .08, and the next closest one is District 11 which is .09 under Polsby-Popper.

Q Which was the least?

A So District 3 is the least.

Q Thank you.

A And then District 3 is .19 on Reock, and the next lowest is District 9 which is .20.

Q Which is the least?

A It's the least, yes.

Q So you agree with me under the enacted plan as measured by the two tests that you've used before, CD 3 is the least compact of all the adopted districts?

A Yes, I agree.

Q So let's look at the Schwartzberg test as well. It's the least compact there as well; right?

A No. I can't say that with certainty, because the number in the chart is different from the number that I ran.

Q Okay. All right—

A I'm sorry. To rephrase, I think that's correct. It's 3.07 and 3.06. I think the difference was on the alternative plan, so, yeah, that is true as well.

Q So CD 3 is the least compact as measured by Schwartzberg as well?

A Because District 11 is 3.06, and District 3 is 3.07. and the Schwartzberg as the higher would be less compact. So by one hundredth of a point, yes.

Q The answer is the least compact as measured by all three—

JUDGE PAYNE: You know, was somebody going to ask him whether it makes any difference how compact it is and what the significance is between 3.6 and 3.7?

MR. HAMILTON: The question has already been asked, Your Honor.

JUDGE PAYNE: I didn't pick up the answer.

MR. HAMILTON: Okay. I'm sure we'll be addressing it.

JUDGE PAYNE: I'll ask him later.

Q Contiguity is another traditional redistricting criteria. You mentioned that this morning?

A Yes.

Q You'll agree with me that there are more areas of CD 3 that are contiguous by land in the alternative plan than under the enacted plan; that's true, isn't it?

A I don't know. I've not performed that analysis.

Q Okay. So you don't have a conclusion one way or the other?

A Sounds reasonable, but I have to assume so, because there's—Newport News is the change that we've talked about, so I would assume so.

Q Now, we talked this morning about locality splits a little bit in your direct examination. CD 3, under the alternative plan, contributes to fewer locality splits than CD 3 under the enacted plan; right? We're not going to disagree about that?

A Locality splits, correct.

Q So we can look at that. There's a demonstrative. It's one of the tables that's up there. This is Plaintiffs' Exhibit 29 at page four. It's on the screen. You'll agree with me that—this is VTD splits. Wrong slide.

A Yeah, those are VTD splits.

Q I don't think she has the right slide. Never mind. But you'll agree with me the alternative plan contributes to fewer locality splits than—in CD 3 than under the enacted plan; right? Locality splits.

A Yes. We've discussed that. There's one fewer locality split in the alternative plan than the enacted district.

Q And if we look at what is up on the screen, the same is true with respect to VTD splits.

A Well, again, I take—I take issue with the way this is presented.

Q But the question is, the number of VTD splits listed by district, at least in Plaintiffs' Exhibit 29 at

page four as displayed on the screen, there are far more VTD splits in CD 3 than any other; isn't that true?

MR. GORE: Object to the question. He's asking about what the chart shows, not what the actual facts are.

MR. HAMILTON: Let me rephrase.

JUDGE PAYNE: Object to the form of the question. Rephrase it.

MR. HAMILTON: I will rephrase it, Your Honor.

JUDGE PAYNE: All right.

Q The number of VTD splits in CD 3 is greater than the number of VTD splits in any other district in the enacted plan; isn't that true? We're not going to disagree about that?

A In the enacted plan and the alternative plan, yes.

Q My question was about the enacted plan.

A The enacted plan, yes.

Q Now, you mentioned in your testimony this morning that preserving district cores is the traditional redistricting criteria; do you recall that?

A Yes.

Q I think you said that that meant including most of the residents, that's how you measure it, by how many residents remain from the benchmark in the new enacted district; correct?

A That's my understanding, yes.

Q And you referred to the Virginia Senate criteria, which is Plaintiffs' Exhibit 5. I think it's in

the notebook here. Why don't we take a look at that. It's tab 18 in your witness notebook. Do you have that in front you, sir?

A Yes.

Q You'll agree with me that the phrase cores of districts or district cores does not appear anywhere in this document; right? Those words.

A I don't believe that those words, as stated, appear in the document.

Q And there's a paragraph on communities of interest, but that's a little different concept, isn't it?

A Not necessarily. The communities of interest here are governmental jurisdictions which I take to mean the governmental jurisdictions such as benchmark districts and localities.

Q All right. Dr. McDonald analyzed all of the number of residents or people who moved in and out of CD 3 under the enacted plan; right?

A Yes.

Q And maybe we could look at his analysis. It's Plaintiffs' Exhibit Number 27.

A Okay.

Q I'm sorry, I don't have a tab number.

JUDGE PAYNE: Tab 20. McDonald's report?

MR. HAMILTON: That's it.

THE WITNESS: So we're in the witness binder, okay.

JUDGE PAYNE: In your witness binder, it's tab 20.

Q Tab 20, and the table, I think you testified this morning, is on page 14, table five, and I put it up on the screen for the Court.

A I didn't reference this table previously.

Q All right. Let's take a look at it. You've looked at these numbers before; right?

A Yes.

Q You don't dispute that they're accurate?

A They're accurate.

Q Let's look at the population movement. That's on page 15, the next page over.

A Okay.

Q The second column here shows the number of residents who were taken out of their previous district under the benchmark and placed in the new district under the enacted plan; right?

A Could you rephrase the question.

Q Sure. See the column that says total population?

A Yes.

Q That is all the people who were affected by these swaps; right?

A Yes.

Q And if we totaled up all of the residents in that column, the sum is 181,540. Sounds about right, doesn't it?

A Yes.

Q So 181,540 people no longer comprise the core of their previous districts; right? That's how many people were moved?

A In all of the trades, yes.

Q And also, that at least in part, CD 3 could increase by 63,976 people.

A So Congressional District 3, yes, it needed to gain population. It gained 63,976 to reach ideal population; yes.

Q Let's return to your table, your report, which is exhibit, Intervenor Exhibit 13 at page 24. This is out of your report. I think you testified about this table this morning.

JUDGE PAYNE: Is that tab two?

MR. HAMILTON: That is tab two. In the witness notebook it's tab two, for the record, Intervenor Defendants' Exhibit 13, and we're looking at the table at the bottom of page four. For your convenience, it's up on the screen as well. This is your calculation—

JUDGE O'GRADY: What page are you on, sir?

MR. HAMILTON: Page 24.

THE WITNESS: Thank you. It's table 14.

JUDGE O'GRADY: Thank you.

THE WITNESS: Yes, that's my table.

Q This is your analysis?

A Yes.

Q And you are comparing the preservation of cores of the benchmark districts in the enacted plan against the preservation of cores in the benchmark districts in the alternative plan; correct?

A Yes.

Q According to your calculation, an average of 86 percent of residents in districts came from the same benchmark districts under the enacted plan; correct?

A That is an average of the scores of each of the districts, yes.

Q And according to your calculation, 84.5 percent of the residents in districts came from the same benchmark districts under the alternative plan?

A Yes, the alternative plan keeps nine of the 11 districts the same.

Q The alternative plan, on average, is about 1.5 percent lower than the enacted plan?

A Yes.

Q Okay. Let's talk for a minute about racial balance. If I've understood your testimony correctly, it's your view that the alternative plan does not result in greater racial balance than the enacted plan; is that right? That's what you said in your report?

A I believe that's what I said in my report.

Q And you define significantly greater racial balance to mean a district that is not racially identifiable; is that right?

A Can you show me in my report? I think I understand that, but I'd like to see the report.

Q Sure. Tab two, Intervenor Defendants' Exhibit 13, page 27, I think is where you want to look.

A Okay.

Q You define significantly greater racial balance to mean a district that is not racially identifiable.

A Well, that's not the definition of significantly greater racial balance. The sentence here is talking about a district.

Q Would you read the sentence?

A Sure. As I understand it, the purpose of the requirement is to cure an alleged racial gerrymander and turn the gerrymandered district into one that is not racially identifiable.

Q So in your view, a majority-minority district is, by definition, a racially identifiable district?

A In general, I would say yes. It's something—it's a metric that could be identified. You would see that a district is a majority-minority district by looking at the census data, yes.

Q A majority-minority district, by your definition, is a racially identifiable district. Yes? That's your definition.

A That's not my only definition, but as you've described it that is—that seems to make sense.

Q So the only way that you can achieve what you describe as significantly greater racial balance is by going from a majority-minority district to a district that is majority non-black; is that your view?

A Well, there may be other ways to measure whether something is racially identifiable.

Q Sir, a majority white district is racially identifiable, isn't it? Identifiable by a different race?

A Sure.

Q Significantly greater racial balance could mean a more even distribution of racial groups across districts; right? That's one possible definition?

A I suppose that's a possible definition, yes.

Q Another possible definition of greater racial balance might mean a more even distribution of racial groups within a district; isn't that true?

MR. GORE: I object, Your Honor. This is all turning into legal questions about the Supreme Court's definition of significant—

JUDGE PAYNE: I think not.

MR. GORE: This witness is not an expert in law.

JUDGE PAYNE: I think he's asking about his definition.

MR. HAMILTON: May I proceed?

JUDGE PAYNE: Are you?

MR. HAMILTON: I'm asking about his report because—

JUDGE PAYNE: I said definition. I meant report. You are on cross-examination. I'm not sure where you are getting with it.

MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: What point you are making with it.

Q So the question I think that we didn't have an answer to is, another definition of racial balance could mean a more even distribution of racial groups within a district; isn't that true?

A That could be a definition.

Q Under the enacted plan, CD 3 has a BVAP, using the inclusive method, of 57.2 percent; correct?

A Yes.

Q Under the alternative plan, CD 3 has a BVAP of about 51 percent; correct?

A Correct.

Q And the number and percentage of black voting-age residents in CD 2 would increase under the alternative plan?

A Well, let's see. If I can look at the numbers, there's a chart on tab 32 of my binder that has those numbers.

Q But this isn't hard. The two previous questions you just answered, under the enacted plan, the BVAP is 57.2, and under the alternative plan it's only 51 percent. So—

A You were asking me about District 2, and you haven't shown me any information about District 2, and the only place I see information about that is on this one chart.

Q Okay. Let's put the documents aside for a second. You know that the difference between the alternative and enacted plan is right here on these charts. It's the swaps between CD 2 and CD 3. That's the difference between these two; right?

A Yes.

Q So if the black population goes down in CD 3, it's going to be going up in CD 2 by definition, because those are the only swaps that make any difference in these two maps; right?

A Yes.

Q So if the number of black voting-age population goes down in CD 2, it's going to be going up in CD 3; isn't that true? It has to. It's just math.

A I think you got your districts reversed, but if it goes down in District 3, it goes up in District 2.

JUDGE PAYNE: I think this is a convenient point to take the morning recess, and we'll take a 20-minute recess during which time you can now undertake the art of triage.

MR. HAMILTON: I'll be very brief when I come back, Your Honor.

(Recess taken.)

JUDGE PAYNE: All right.

MR. HAMILTON: I have no further questions.

JUDGE PAYNE: It's a magnificent exercise of triage. All right. Redirect.

JUDGE DUNCAN: Hopefully, to be emulated.

REDIRECT EXAMINATION

BY MR. GORE:

Q Mr. Morgan, just a couple of topics I'd like to touch upon. Will you turn to Tab 35 in your binder, which is Demonstrative 11, Intervenor-Defendants' Demonstrative 11. Mr. Hamilton asked you a few questions about this demonstrative.

A I have that.

Q Do you remember those questions and talking about this demonstrative?

A Yes.

Q Mr. Hamilton talked about the difference in Democratic vote share and the difference in BVAP in areas moved in and out of District 3. Do you remember that line of questioning?

A Yes.

Q Does this demonstrative prove that race predominated in the Enacted Plan?

A It doesn't prove that race predominated in the Enacted Plan.

Q Why not?

A Well, because, as I went through this with you previously, the trades between Districts 1 and 3, 2 and 3, 3 and 4, and 3 and 7 are—they show a political benefit to incumbents of both parties, and they're explainable by politics, and incumbency protection, and the preservation of the benchmark districts.

Q Okay. Thank you.

Can you turn now to Tab 20, which is Plaintiff's Exhibit 27, and go to page 15 of that report? Do you recognize this chart?

A Yes. On page 15, yes.

Q Mr. Hamilton asked you some questions about this, and I think you pointed out, and I don't think there's a dispute on the math, that these trades involving District 3 affected about 181,000 people?

JUDGE PAYNE: Are you on page 15 now on the chart on that page?

MR. GORE: Yes, I am, Your Honor.

JUDGE PAYNE: Would you go over that again because I think we were all trying to find where you were?

MR. GORE: Absolutely, Your Honor.

Q So Mr. Hamilton asked you some questions about this chart?

A Yes.

Q Do you remember that? And he added up the total population or at least suggested that the total population if you add it through all the columns is about 181,000 people.

A That's what he suggested, yes.

Q So that would be 181,000 people were moved into and out of District 3 through all of these trades combined?

A That's right, involving four districts.

Q How many districts were involved in those trades?

A Five districts if you include District 3.

Q Again, not meaning to turn this into a math exercise, but if there were five districts and 181,000 people total moved, what's the average of people that were moved for each district?

A Maybe 32,000, 33,000.

Q Great. I'd like to compare that quickly to some changes we talked about in the Alternative Plan yesterday. Can you turn now to Tab 6, which is Intervenor-Defendant's Exhibit 17?

A Yes.

Q What does this chart show? What does the right-hand side of this chart show?

A The right-hand chart shows the population changes for the Benchmark to the Alternative Plan.

Q How many districts are involved in the changes shown on this chart?

A There are three districts.

Q How much total population does the Alternative Plan move between those three districts?

A 287,000.

Q How does that compare to the number we just saw for the five districts in the Enacted Plan?

A It's much higher. Doing the same calculation, it would be just under 100,000. 96,000 average.

Q Per district?

A Per district.

Q Okay. Great. Now, will you turn to Tab 17, which is Intervenor-Defendants' Corrected Exhibit 50?

A Tab 17?

Q Yes.

A Okay.

Q Mr. Hamilton asked you some questions about the mistake that was made with respect to these charts. Do you remember that?

A Yes.

Q Did that mistake and the correction of that mistake change any of the numbers in column one or column four of either of these charts?

A No, it had no impact on column one or column four.

Q Did the changes that were made to columns two and three through those corrections change your opinions in this case in any way?

A No.

Q Assume with me for a minute that Mr. Hamilton - Mr. Hamilton mentioned a few other

VTDs that might have been misassigned in the data. Do you remember that?

A Yes.

Q Assume with me for a minute that he's correct and all of those were misassigned. Would that mistake affect your opinions or your analysis in this case at all?

A He mentioned three. I agreed with one of the three for sure. It wouldn't change my opinion, no.

Q If he was right about all three, would that change your opinion?

A No.

Q Dr. McDonald testified that this VTD pattern shown in columns one and four showed that race predominated; is that right?

A That's my understanding of what he testified to.

Q Do you agree that columns one and four of the analysis shown there shows that race predominated in the Enacted Plan?

A No, I believe we looked at that in detail on my testimony that the political composition is an explanation for this.

MR. GORE: No further questions.

JUDGE PAYNE: All right. Any other evidence from the defense?

MR. CARVIN: No other witness for the intervenor defendants.

JUDGE PAYNE: And you rest?

MR. CARVIN: We do.

JUDGE PAYNE: How about for the state?

MR. MELIS: We have no witnesses. We rest.

JUDGE PAYNE: You rest. All right.

Rebuttal.

MR. HAMILTON: Your Honor, we call—

JUDGE PAYNE: Hold on just a minute, please. Sorry, Mr. Hamilton.

What, Mr. Carvin?

MR. CARVIN: Just for the record, to make sure I'm complying with the Federal Rules, we'd like at this point to renew our motion for a directed verdict as a matter of law at the close of our case.

JUDGE PAYNE: All right. We'll take that under consideration as well.

MR. MELIS: For the record, Your Honor, the defendants will join in that.

JUDGE PAYNE: Then yours will be, too.

All right, Mr. Hamilton. You said you had Dr. McDonald for rebuttal?

MR. HAMILTON: I do, Your Honor. I have what I think is about a half an hour in rebuttal, and then, of course, there will be cross-examination, and then I think we'll be done. But I wanted to alert the Court of that timing because yesterday I think I said an hour. I'll try and keep it to a half an hour. It might go a little bit over that, but that's what I'm anticipating.

JUDGE PAYNE: Dr. McDonald, please come back to the witness stand. You are under the oath which you took yesterday. And please keep that in mind, sir.

MICHAEL P. McDONALD, called in rebuttal by the Plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAMILTON:

Q All right. Dr. McDonald, welcome back.

Can you please turn to Intervenor-Defendants' Exhibit 50?

A I have no books.

JUDGE PAYNE: What book do you want up there? The big book with intervenor defendants in it? Or do you want that tab that we were just using? How do you want to deal with it?

MR. HAMILTON: It's a very good question, Your Honor. What I need is Plaintiffs' Exhibit—

JUDGE PAYNE: Plaintiffs'?

MR. HAMILTON: Well, right now I'm looking at intervenor-defendants' exhibits. I'm going to use four exhibits. And the first is Intervenor-Defendants' Exhibit 50. It's in the last witness notebook.

JUDGE O'GRADY: Corrected 50?

MR. HAMILTON: Yes, corrected 50. That's Tab 17 of the witness notebook.

MR. GORE: Your Honor, if I may, I believe that the original 50 is what's displayed on the screen. So I'd ask that the corrected 50 be placed on the screen if that's the one we're talking about.

JUDGE PAYNE: You have in front of you, Dr. McDonald—do you have a little notebook there that says, "Morgan Witness Binder"?

THE WITNESS: No, I do not.

JUDGE PAYNE: Well—

THE WITNESS: This is intervenor—

JUDGE PAYNE: Then go turn to Exhibit 50 in the intervenor defendants' book, and that's the last exhibit, I think. That will be fine. Just use that one.

THE WITNESS: Yes, I have that.

JUDGE PAYNE: All right. That's not the last exhibit.

BY MR. HAMILTON:

Q All right. If we can zoom in just a little bit so we can see the numbers a little more clearly.

JUDGE PAYNE: Now, is the corrected one on the screen? I think he had asked to have that done.

MR. HAMILTON: That is done.

JUDGE PAYNE: It's now taken care of. All right.

BY MR. HAMILTON:

Q All right, sir. Mr. Morgan testified about VTDs in the adjacent columns. So before we get into what this table means or your analysis of this table, let's start with the word "adjacent." Well, what did you mean by the word "adjacent"? Can you define that for us as used in your analysis?

A It's localities that are split by CD 3 or are adjacent, immediately adjacent, to CD 3. And in a footnote I also describe exclusions some counties do to some data limitations.

Q Mr. Morgan testified during the defendants' case that VTDs listed in the adjacent column could have been located miles, I think he said 20 to 30

miles, from the actual district border and therefore couldn't possibly have been included in CD 3. Do you recall that testimony?

A Yes, I do.

Q Did the General Assembly only assign VTDs that were immediately on the border with benchmark districts in this redistricting plan?

A They did not.

Q What did they do?

A In one case, in CD 5 they assigned VTDs that were three counties removed from the benchmark district, for example. So, yes, at times the General Assembly went to extreme 50 miles or more to incorporate VTDs into benchmark districts.

Q So let's just very briefly look at a couple of examples. And I'd ask you to turn to Plaintiffs' Exhibit 48. It's not in the witness notebook. Plaintiffs' Exhibit 48.

A Yes.

Q What is this?

A These are maps that I've produced that show the districts, the benchmark—well, the adopted districts, they are colored, and then there's some later maps in here where there are red outlines, and those were the benchmark districts. So we could overlay and see how the benchmark districts changed to the adopted districts.

Q So can you give us some examples of some VTDs that were in the interior and not on the border of the benchmark district that were selected in the Enacted Plan?

A For example, we were just discussing Petersburg. That's on page 8 of this exhibit. What we see is that benchmark District 3 is that red line. The City of Petersburg was not even adjacent. immediately adjacent, to Congressional District 3, yet VTD that was on the far side. western side, of Petersburg was included in benchmark—excuse me—adopted Congressional District 3 as one example.

JUDGE PAYNE: Wait a minute. Are you saying that Petersburg wasn't adjacent in the Benchmark Plan?

THE WITNESS: Petersburg did not share a border with the benchmark District 3.

JUDGE PAYNE: Right, but it does in the Enacted Plan?

THE WITNESS: Correct, yes.

BY MR. HAMILTON:

Q In other words, when they were drawing the new Enacted Plan, this whole—if we look at the map here, that is page 8 in Exhibit 48, the entire City of Petersburg was added to CD 3; isn't that true?

A Yes.

Q And so, again, just so we're all clear on this, the red line on this map that we're looking at right now, that's the old border of CD 3?

A Correct.

Q Okay. And the new border of CD 3 in the Enacted Plan?

A It's the salmon-colored, pinkish-colored VTDs.

Q Do you have another example?

A Another example which demonstrates the lengths to which the General Assembly went to with respect to CD 3 and CD 2 is on page 7. It's a little more difficult to read. So I'll have to walk us through this.

The benchmark districts, again, are in red, and if we look at Newport News and Hampton, the middle part, the shared border between Newport News and Hampton, that area was previously in District 1, and Mr. Morgan testified to this as well. But what happened here is that CD 1 was moved north out of Newport News and Hampton. CD 2 used to come around and split Hampton just up to that borderline that was previously where District 1 was and District 2 on the northern part of Hampton.

After CD 1 moved north, CD 2 filled that vacuum and moved all the way into Newport News. And it didn't stop just there. The boundary on Newport News that was formerly between District 1 and District 3, that is also—the other half of Newport News, that is that red boundary, that was District 3. And so the new CD 2 not only went through Hampton and Newport News but even went further into benchmark District 3 in order to grab a precinct, I believe it's called Nelson precinct, that is in the northwest tip of now Congressional District 2, which is that green color in Newport News.

JUDGE PAYNE: You mean that it does include it?

THE WITNESS: It does. So—

JUDGE PAYNE: You said it was done in order to do it. That's testifying to a purpose as opposed to a thought.

THE WITNESS: No. These are just the facts that the district lines changed in this way. And that when I was including localities that were adjacent to, and VTDs that were potentially in this pool of VTDs that could be included into this analysis, I thought it was reasonable given what actually occurred with the redistricting between the benchmark and the adopted district to include all of those VTDs in localities that were adjacent because—

Q Let me just stop you there. So just looking at the map, if we look at the top left-hand corner, that green arm that reaches out, that's all new territory that got added to the Third; is that right? Or got added to the Second? I'm sorry.

A Added to the Second, yes. The green area is the Second District. It's former boundary was in Hampton.

Q Where the red line is?

A The red line, yes.

Q So if we want to see how far they went into the interior we just look from the red line up to the highest point in the upper left-hand corner?

A Yes.

Q Just quickly one more. Any other examples?

A There's another example of distance that was traveled if we look on page 10.

Q What are we looking at here?

A Here we have, again, the overlay of the red districts or the red boundary is the benchmark district. That district, that red boundary encompasses New Kent. Mr. Morgan testified to this previously. So he knows this.

JUDGE PAYNE: I think the question, though—

THE WITNESS: New Kent was—

Q Stop.

JUDGE PAYNE: Which one was added?

MR. HAMILTON: Thank you, Your Honor. That is the question.

BY MR. HAMILTON:

Q The question is: Where is the VTD that was added on this map?

A Right. I'm giving you some context.

JUDGE PAYNE: You don't need anything but where it is right now. If he wants more than that, he can get it.

A So the far western portion of—excuse me—eastern portion of New Kent, that was a VTD that was formerly in Congressional District 3, and it was assigned to Congressional District 7. That's about 30 miles. Twenty miles, excuse me.

Q Do you know the name of that precinct?

A I can't recall it right offhand.

Q All right. In light of those decisions that the General Assembly made in the Enacted Plan, do you believe that your definition of "adjacent" for the purposes of Exhibit 50 is appropriate?

A Yes, sir.

Q Now, I don't want to belabor this, but you looked at this underlying data, and I believe you found some errors in the underlying data used to create corrected Exhibit 50 or the original Exhibit 50?

A Yes.

Q Which VTDs did those affect?

A The VTDs that I identified were in Petersburg.

Q Okay. Did you identify any other errors?

A Yes, I did.

Q Where were those?

A These were VTDs that were unassigned in Mr. Morgan's added data to the NCEC data, and we discussed those. Those were Suburban Park, Willard, and Lafayette, which is the dual split of Willard and the data within Norfolk, and then Richmond, 309 in Richmond, and I did have the luxury of having the geographic software on my laptop and was able to confirm that.

Q Other than Petersburg, Norfolk, Suburban Park, Norfolk, Willard and Richmond 309?

A Yes, those were—Mr. Morgan had unassigned those to any district, and they should be properly assigned to CD 3.

Q Did corrected Exhibit 50 catch and correct all those errors?

A It did for the purposes of his table. He did correct all of the data that underlie the numbers in his table.

Q Mr. Morgan testified that these errors were insignificant to the outcome. Do you agree with that?

A No.

Q Why not?

A The assignment of Petersburg is—Petersburg's potentially the highest black voting-age population locality in the Commonwealth of Virginia. So the

misassignment of Petersburg would significantly affect your analyses.

Q Have you attempted to re-create this analyses yourself?

A I have.

Q When did you do that?

A Well, we had received—

Q Just when?

A We tried to is what I was going to first say. We were unsuccessful. Then we were successful after Mr. Morgan had provided the revised data. And that would be on two days ago in the afternoon.

Q Let me direct your attention to Plaintiffs' Exhibit 57. It should be in front of you.

A Yes.

Q We just need the first page. What is this document?

A The document, before we had Mr. Morgan's corrected VTDs or corrected analysis, corrected table I should say, we were working probably simultaneously. He was working and we were working on this. And so I put his original table there as a way to show what the changes were. And then the table below are the corrections that I had identified in the first four columns, and then there's a fifth column—

Q Hold on. I just want to be clear because I don't want to mislead the Court. The top table is the original table produced by Mr. Morgan before Mr. Morgan corrected it himself, correct?

A Correct.

Q And the numbers there are identical to the original, I think it's Intervenor-Defendants' Exhibit 50, to the best of your knowledge?

A Yes.

Q And then this table down below, Mr. Morgan's corrected table, when you gave it that title, had you seen Mr. Morgan's, the table that he himself actually corrected?

A No, I had not.

Q All right. So this is your efforts to correct Mr. Morgan's table before Mr. Morgan corrected his only table?

A Yes.

Q So the title might be more, "Mr. Morgan's table, corrected by Dr. McDonald," that would probably be a more accurate title?

A Correct, yes.

Q Thank you.

You said that there was an additional column. Which column is additional?

A This is the now fifth column in the corrected table as I've described it down below, which is—the heading for it is in benchmark District 3 but not enacted District 3. These were the VTDs that were removed from benchmark District 3.

Q Okay. So let's just go through this just to make sure we understand. We're looking at the bottom column. Maybe you could zoom in a little bit more on the bottom table here.

And so the center, the column entitled, "In Localities Adjacent to Enacted District 3," I think we

understand what you mean by "adjacent" now. Is that what you consider to be the pool of potentially available VTDs that could have been assigned to CD 3?

A Yes.

Q And then the next column to the left, "In enacted District 3 but not in benchmark CD 3," can we think of that as sort of the ones that were selected or added to CD 3 in the Enacted Plan?

A Yes.

Q And the new column that you add on the far right-hand side in benchmark CD 3 but not in enacted CD 3, can we think of it in shorthand as those are the ones that were dropped from the benchmark?

A Yes.

Q So that's the table that you created?

A Yes.

Q So let's walk through this a little bit to understand what this is showing us. Looking at the political performance, the average Democratic vote, that's the middle line, what was the average Democratic vote in the localities adjacent to enacted CD 3?

A This is a number from my original report and this is 65.4 percent.

Q Okay. And out of that pool, what was the average Democratic vote of those selected? That is, reflected in the middle column in enacted CD 3, but not in the benchmark.

A I would point out at this point that Mr. Morgan identified one additional error when we were working on this. So that number is slightly different in his report and I do agree with his correction.

Q That's fine, but what's the number?

A It's 77.9. It's not going to make a material difference.

Q What's the correction?

A Excuse me?

Q What's the—

JUDGE PAYNE: If he agrees and they agree, does it make any difference about the correction?

MR. HAMILTON: I'm about to calculate the number. So I want to know if it's a significant difference.

A Mr. Morgan had identified in addition to the Petersburg errors that we had alerted them to Tuesday afternoon, that he had also misallocated a precinct in Hampton, and he made that correction when he produced his corrected table.

Q Does it change the number here?

A It changes it slightly.

Q What would it change it to?

A I believe it's—we'd have to look at it.

Q You don't know?

A No.

Q We'll use this number then. It's not a material difference?

A It's not a big difference because it's only one precinct.

Q Okay. So looking at the—let's go back to where we were before we went off on that excursion. If we look at the average Democratic vote performance from localities adjacent to enacted District 3, the average Democratic vote was what?

A Those in adjacent were 65.4 percent.

Q Of those that ended up in the Enacted Plan, what was the average Democratic vote?

A 77.9 percent.

Q What's the difference between those two numbers?

A It would be 12.5 percent.

Q Okay. Now let's look at the ones that were dropped. What's the average Democratic vote of the VTDs in benchmark 3, but not in the enacted CD 3?

A 58.7 percent.

Q What's the difference between those two numbers?

A It's 6.7 percent.

Q So if we were just to look at that number, what would you conclude? What's your conclusion?

A That higher Democratic precincts were added to benchmark 3 than those that were removed.

Q Okay. Let's look at the next line down then. Let's look at the racial impact of these moves.

So starting with the pool, the localities adjacent to enacted CD 3, what was the average black voting-age population in that pool of available districts?

A 43.5 percent.

Q And of those selected to be included in CD 3 but that were not in the benchmark, that is, those that were added, what was the average BVAP?

A 57.0 percent.

Q What's the difference between those two numbers?

A 13.5.

Q Right. Okay. So now let's look at what was dropped. So of the pool and localities adjacent to enacted CD 3, the pool was 43.5. What was the average BVAP of those that were in the benchmark but that somehow didn't make it into the enacted CD 3?

A 22.4 percent.

Q 22.4 percent?

A Yes.

Q What's the number?

A 22.4 percent.

Q I guess I'm just asking you for the number in the lower right-hand box.

A Oh, 21.1. I thought you asked me to subtract.

Q No. So the difference between the pool and those that were dropped is?

A 22.4 percent.

Q Okay. 22.4.

So what do you conclude from that? Well, actually, let's do one more calculation before I ask you for your conclusion. What's the difference between those that were not in the benchmark but added and those that were in the benchmark that were dropped?

A Which number?

Q 57 minus 21.1?

A The black voting-age population, the difference is 35.9 percent.

Q A 35.9 percent swing?

A Yes.

Q Now, looking at these numbers, having considered the column that we've added, what's your professional conclusion?

A That the districts that were removed from CD 3 were substantially whiter than those that were added to CD 3.

Q Have you concluded—if you looked at both the race and political performance numbers, does this support or undermine your primary conclusion that race predominated in this redistricting plan?

A It does support it because the differential between the partisanship is much less than the differential that we're seeing when we look at the race.

Q Is that consistent with your original conclusion that white precincts were being moved out of CD 3 and black precincts were being moved into CD 3?

A Yes, it does. And what's going on here, these are just numbers.

JUDGE PAYNE: If he wants an explanation, Dr. McDonald, he'll ask for it.

Q Yes, it does?

A Yes, it does.

Q Can you explain, please?

A Yes. So we're not just talking about—I know where some of these districts are. So these are statistics, but what's going on here also is a subordination of traditional redistricting principles to put—three of these districts. I mean, they are very blatantly—

MR. CARVIN: Objection. This goes well beyond rebuttal. It goes well beyond this chart. Now he's just testifying freelance on something that's not in his report and is not responsive to anything that Mr. Morgan said.

THE WITNESS: This is in my report.

JUDGE PAYNE: Excuse me. Your response to his objection?

MR. HAMILTON: Your Honor, I think it's directly responsive to Mr. Morgan's testimony in the defendants' case, and it is in the report.

JUDGE PAYNE: It sounds to me like it's mostly argument. So maybe you can get it in the frame of an evidentiary construct and do it that way.

MR. HAMILTON: I will.

JUDGE PAYNE: Dr. Morgan, your job isn't to argue the case.

BY MR. HAMILTON:

Q Before we leave this exhibit, I'm just going to ask you one more question, Dr. McDonald. What, if anything, does the corrected table tell us about whether race was a predominant factor in drawing CD 3?

A It tells us that race was predominated over politics.

Q Why?

A Because the choice—when the General Assembly selected VTDs to put into the adopted precincts, they choose heavily African-American and Democratic districts, but when we look at those that were removed, they were also heavily Democratic, a little bit less so, but they were much less so in terms of their race.

Q Thank you, sir.

Let's switch topics now. If I can direct your attention to Mr. Morgan's report. It is in the witness notebook and it's also Intervenor-Defendants' Exhibit 13. It's Tab 2 in that black notebook in front of you.

A Mr. Morgan's report?

Q Do you have it?

A Mr. Morgan's report, yes.

Q Please turn to page 26.

A Yes.

Q If I can direct your attention to the first full paragraph. Actually, let me flip you back a page. The sentence beginning at the very bottom of page 25. I'd like you to review the sentence that begins at the bottom of page 25 and then the paragraph completes at the top of page 26.

This is the segment of Mr. Morgan's report in which he offers evidence that the Enacted Plan does not diminish the ability of black voters to elect their candidates of choice. Have you read that?

A Yes.

Q What evidence does he offer to support that proposition?

A It's in the preceding sentence, and it says. The Enacted Plan increased District 3's black BVAP on both of Dr. McDonald's preferred measures 3.2 percent exclusive and 3.3 percent inclusive.

Q Does that tell you whether ability to elect has been diminished?

A No, it does not.

Q Why isn't that the safe way to approach it? Just to increase the BVAP to make sure that you're not going to retrogress?

A Well, to belabor the point, you need to do a racial bloc voting analysis.

Q In the absence of that analysis, in your professional opinion, did the General Assembly have ample reason to use a 55 percent BVAP floor to receive DOJ preclearance?

A No.

Q Let's turn to page 24. Last subject and then I'll sit down. There's a table there at the bottom of page 24 prepared by Mr. Morgan. Have you reviewed that table before?

A Yes.

Q What does it show?

A This shows his calculation for the preservation of cores of the benchmark districts.

MR. CARVIN: I'm going to object. When I asked him yesterday whether he reviewed this, he said no, and I was not allowed to ask any questions about this yesterday. So he can't now switch back and say he's familiar with it and offer an opinion on it. I was stopped from questioning him about this.

MR. HAMILTON: Your Honor, he was stopped from questioning him about it because Mr. Morgan hadn't testified about it, and we had a cart and horse problem. The same reason I couldn't examine Mr. McDonald on his direct about Mr. Morgan because he hadn't testified about it.

MR. CARVIN: Well, obviously, the only chance I was going to have to ask Dr. McDonald about Mr. Morgan was yesterday. It was not at all remotely comparable. I was stopped because you objected and said I couldn't ask him the questions, and Dr. McDonald said he hadn't reviewed it. That's why I was stopped from asking.

MR. HAMILTON: Well, first of all, Your Honor, he wasn't stopped—

JUDGE PAYNE: Let's get this straight, to begin with. He has a right of cross examination. So if in fact he has reviewed it and he's qualified to testify about it, then Mr. Carvin will have a right to cross-examine him, and he hasn't been deprived of anything.

But the fundamental point that he is raising is that previously Dr. McDonald said he isn't familiar with this issue or with this table, and that therefore he was stopped from asking questions about this particular table.

So the threshold question is: When did he get familiar with it if he is familiar with it at all? Between the time Mr. Carvin was questioning him or is Mr. Carvin simply wrong about his recollection?

MR. HAMILTON: I think—

JUDGE PAYNE: Ask the witness. That's what I'm suggesting to do. Ask the witness—

MR. HAMILTON: I will do that.

JUDGE PAYNE:—about it. When did he learn about this?

BY MR. HAMILTON:

Q When did you review this table in Mr. Morgan's report that's dated March 24, 2014?

A I reviewed it when I wrote a reply report to Mr. Morgan.

Q This was part of Mr. Morgan's report?

A Yes.

Q You wrote a reply to it?

A Yes.

Q Do you recall testifying yesterday that you didn't recall reviewing this?

JUDGE PAYNE: It's all right. You can go ahead and ask him the question. The objection is overruled.

BY MR. HAMILTON:

Q Do you recall testifying yesterday?

A Yes, I do. Yes, I do recall testifying yesterday, but not on this point.

Q We may have consumed more time on this objection than the table is worth, but let me just ask you a couple questions about it. It purports to represent a preservation of cores and an analysis of the preservation of cores in the benchmark districts prepared by Mr. Morgan. Is that your understanding?

A Yes.

Q What is the average retention percentage for Enacted and Alternatives Plans? What's the spread here?

A For the Enacted Plan, it's 86.0 and for the Alternative Plan it's 84.5.

Q How do those numbers compare?

A It's a 1.5 percentage point difference.

Q Let me direct your attention to page 25 of Mr. Morgan's report.

A Yes.

Q What's the next measure of retention of core?

A Mr. Morgan says the Enacted Plan preserves between 71 percent and 96 percent of the cores of the benchmark districts. So he's providing a range of the preservation of cores.

Q What's the range for the Alternative Plan?

A He doesn't provide—

Q That's not my question.

A He doesn't provide it, so I'm going to have to calculate it.

Q It's in the table, isn't it?

A I'm going to have to look at it. It's 69.2 to 96.2.

Q How do those changes compare?

A They are substantially similar.

Q What's the next metric, looking at page 25, that Mr. Morgan uses?

A It says, "And preserves 83 percent or more of the cores in nine of eleven districts, including District 3."

Q Is there any special magic or significance to the cutoff of 83 percent that he used?

A No.

Q All right. Well, let's use it anyway. How do the plans compare using Mr. Morgan's 83 percent cutoff?

A He says that nine of the eleven districts were at this threshold of 83 percent or higher.

Q How about the Alternative Plan?

A That the Alternative Plan—well, he doesn't—

Q You'll have to look at the table.

A Yeah, I'm going to have to look at the table again. So at 83 percent or higher. So I believe it's seven of eleven districts.

Q What if we instead of using 83 percent, we used the cutoff of 82 percent retention? Now how do the numbers look? Start with the Enacted, how do they compare?

A The Enacted would have the same number as before, nine of 11.

Q How about the Alternative?

A At 82 percent, there's one district that changes, and so that would now be eight of eleven.

Q So how do they compare at least using Mr. Morgan's metrics?

A Substantially similar.

Q Does that reflect a significant difference in how the two plans treat preserving the cores?

A It's a slight decrease in preservation of cores by this metric.

Q Is it significant?

A No, it's not significant.

MR. HAMILTON: Thank you, sir.

No further questions, Your Honor.

CROSS-EXAMINATION BY MR. CARVIN:

Q Why don't we begin where you left off. Could you stay there on page 24 on Tab 2, please?

A Yes.

Q And you just commented on the fact that the overall percent retention score for all eleven districts only changed 1 1/2 percent, correct?

A Correct.

Q But the relevant issue here is obviously the changes to District 3 and District 2 because those are the only two districts that were affected by the plaintiffs' alternative, right?

A No.

Q Okay. Did nine of the eleven districts stay the same under plaintiffs' alternative?

A Yes.

Q Okay. So the only changes were to District 2 and District 3, correct?

A Yes.

Q And let's look at District 3. It previously retained 83.1 percent of the old population, and now it retains only 69.2 percent, correct?

A Correct.

Q Is that change significant?

A That is a large change, yes.

Q Is it significant?

A It is a big change, yes.

Q Is it significant?

A It is significant.

Q Okay. And it makes District 3 the lowest ranking district of all eleven districts on the Alternative Plan, correct?

A Correct.

Q Okay. And when you discussed compactness and offered your expert opinion, you thought it was very significant with respect to the Enacted Plan that District 3 ranked lowest of all eleven districts on compactness scores, correct?

A Correct.

Q And when you discussed locality splits for the Enacted Plan, you thought it was very significant that District 3 ranked lowest on locality splits, correct?

A Correct.

Q When you discussed VTD splits in the Enacted Plan, you thought it was very significant that District 3 ranked lowest on VTD splits, correct?

A Yes.

Q So, obviously, you think it's very significant that District 3 now ranks lowest on the cores measure, correct?

A I do find that it's lower, yes. It is significant, yes.

* * *

[Page 436]

BY MR. HAMILTON:

Q So listen to the question, Dr. McDonald. There's five VTDs, I believe you testified, that were dropped, and that we analyzed the political and racial performance of them in Plaintiffs' Exhibit 57. Are you with me so far?

A Yes.

Q And Mr. Carvin was making the point that there's 30 that were being added. You wanted to explain, I believe, during the cross-examination that you knew where these were and there was something significant about where they were. So could you just give us two sentences on that?

A Yes. These are precincts that are located in Norfolk. They are part of that claw, whatever you want to call it, that comes around and grabs predominantly white neighborhoods in Norfolk formerly out of District 3.

Q In grabbing those precincts out of Norfolk, did they split the City of Norfolk?

A The City of Norfolk was already split.

Q Did they exacerbate that split?

A No, they did not.

Q Did they select—was there a racial pattern to the selection of those precincts?

A Yes.

Q What was that racial pattern?

MR. CARVIN: I'll object. There's absolutely no evidence about the racial composition of those VTDs or their political composition anywhere in Mr. McDonald's report or anywhere in his effort to correct

the seven VTDs which are nowhere near Norfolk in Mr. Morgan's Exhibit 50.

MR. HAMILTON: I totally disagree, Your Honor. The next question I was going to ask him to look at the exhibit and tell us what is reflected on the page in front of him.

JUDGE PAYNE: You mean his report?

MR. HAMILTON: In this exhibit that is in evidence.

JUDGE PAYNE: Then ask that question.

BY MR. HAMILTON:

Q Sir, if you look at Plaintiffs' Exhibit 57, we're talking about those five precincts you just described in Norfolk as having a racial impact, can we see that in Plaintiff's Exhibit 57? And if so, where?

MR. CARVIN: I have to object. And maybe just to clarify so I won't have to object again. This says five VTDs. He's mentioned two, as best I can tell, or one. Is he testifying about all five?

JUDGE PAYNE: He wants a clarification of the question because of the numerical difference.

MR. HAMILTON: He's testifying about all five.

JUDGE PAYNE: Then you need to ask the question that way.

BY MR. HAMILTON:

Q Do you have it in front of you, sir?

A The numerical—

JUDGE PAYNE: Ask the question again.

Q Right now the question is: Do you have Plaintiffs' Exhibit 57 in front of you, sir?

A Yes, I do.

Q Looking at the far right column, does this document identify the racial makeup of those five VTDs?

A It does provide an average.

JUDGE PAYNE: It does provide what?

THE WITNESS: An average, yes, of their racial composition.

Q What is that average?

A 21.1 percent.

Q That's the BVAP average?

A Correct.

Q How would you describe that?

JUDGE PAYNE: The black voting-age population?

MR. HAMILTON: Correct.

JUDGE PAYNE: Not the racial composition of the district. It's different, isn't it?

THE WITNESS: The racial composition black versus non-black.

JUDGE PAYNE: So you're saying that you can deduce that from the voting-age population?

MR. HAMILTON: May I ask a clarifying question, Your Honor?

JUDGE PAYNE: Yes, please.

BY MR. HAMILTON:

Q Dr. McDonald, of the five VTDs listed on Plaintiffs' Exhibit 57, the average non-Hispanic black voting-age population is 21.1 percent, correct?

A Correct.

Q And that is a very low BVAP number; isn't that true?

A Yes.

Q That that's those five precincts, correct?

A Correct.

Q At least some of which are in the City of Norfolk?

A Correct.

MR. HAMILTON: Thank you, sir. No further questions.

JUDGE PAYNE: All right. Any other evidence in rebuttal?

MR. HAMILTON: No, sir, Your Honor.

JUDGE PAYNE: All right. The case is submitted.

* * *

No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF FOR APPELLANTS

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December 28, 2015

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QUESTIONS PRESENTED

The two-judge majority below held that Virginia Congressional District 3, which perpetuates a district created as a *Shaw v. Reno* remedy, now violates *Shaw*. The majority, however, never identified any conflict between the Legislature's preeminent race-neutral traditional criteria and its purported racial considerations, never found that "race *rather than* politics" predominates in District 3, and never required Plaintiffs to prove "at the least" that the Legislature could have "achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the Enacted Plan. *Easley v. Cromartie*, 532 U.S. 234, 243, 258 (2001) (emphasis original). The majority therefore found a *Shaw* violation even though Plaintiffs never proved that race had "a *direct and significant impact* on the drawing" of District 3 that "*significantly affect[ed]*" and "*change[d]*" its boundaries and, thus, failed to carry their heavy burden to show "that the legislature subordinated traditional race-neutral districting principles" to "racial considerations." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270-71 (2015) (emphasis added).

Instead, the majority held that race predominated because the legislative sponsor of the Enacted Plan correctly noted that Section 5 of the Voting Rights Act prohibited "retrogression [of] minority influence" in District 3, and that this federal-law mandate was "paramount" over "permissive" state-law traditional districting principles. Jurisdictional Statement Appendix 2a. Judge Payne dissented because the

majority failed to show that Plaintiffs had carried their "demanding burden" to prove that race predominated in the drawing of District 3. *Id.* 47a.

The questions presented are:

1. Did the court below err in failing to make the required finding that race rather than politics predominated in District 3, where there is no dispute that politics explains the Enacted Plan?

2. Did the court below err in relieving Plaintiffs of their burden to show an alternative plan that achieves the Legislature's political goals, is comparably consistent with traditional districting principles, and brings about greater racial balance than the Enacted Plan?

3. Regardless of any other error, was the court below's finding of a *Shaw* violation based on clearly erroneous fact-finding?

4. Did the majority err in holding that the Enacted Plan fails strict scrutiny because it increased District 3's black voting-age population percentage above the benchmark percentage, when the undisputed evidence establishes that the increase better complies with neutral principles than would reducing the percentage and no racial bloc voting analysis would support a reduction capable of realistically securing Section 5 preclearance?

5. Do Appellants have standing to appeal where it is undisputed that any judicial remedy will change at least one district represented by an Appellant and harm that Appellant's re-election chances and interests as a Republican voter?

PARTIES

The following were parties in the Court below:

Plaintiffs:

Dawn Curry Page (dismissed via stipulation Apr. 9, 2014)

Gloria Personhuballah

James Farkas

Defendants:

Virginia State Board Of Elections (dismissed via stipulation Nov. 21, 2013)

Kenneth T. Cuccinelli, II, Attorney General of Virginia (dismissed via stipulation Nov. 21, 2013)

Charlie Judd, Chairman of the Virginia State Board of Elections

Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections

Don Palmer, Secretary of the Virginia State Board of Elections

Intervenor-Defendants:

Cu rent and former Virginia Congressmen Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF AUTHORITIES iv

BRIEF FOR APPELLANTS 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. District 3: A *Shaw* Remedy 2

B. The Enacted Plan 3

C. Plaintiffs' Lawsuit And Alternative Plan 7

D. Dr. McDonald's Concessions 9

E. Liability Decision 12

F. Remedial Proceedings 12

SUMMARY OF ARGUMENT 14

ARGUMENT 23

I. THE MAJORITY FAILED TO APPLY *ALABAMA* AND *CROMARTIE II* 25

II. THE MAJORITY ERRED IN FAILING TO REQUIRE PROOF THAT RACE RATHER THAN POLITICS PREDOMINATED 34

TABLE OF CONTENTS
(continued)

Page

A. The Undisputed Facts Establish That Politics Explains District 3 35

B. The Legislative History Demonstrates That Politics Explains District 3 37

III. PLAINTIFFS DID NOT PROVE THAT RACE RATHER THAN POLITICS PREDOMINATED 39

A. The Majority Erred In Failing To Require Plaintiffs To Produce A Politically Equivalent Alternative 40

B. Delegate Janis's Statements Do Not Show Racial Predominance 43

C. Plaintiffs' VTD Analysis Cannot Show Racial Predominance 46

IV. DISTRICT 3 DOES NOT SUBORDINATE TRADITIONAL DISTRICTING PRINCIPLES 50

V. THE MAJORITY MISAPPLIED THE NARROW TAILORING REQUIREMENT 53

VI. APPELLANTS HAVE STANDING TO APPEAL 57

CONCLUSION 63

TABLE OF AUTHORITIES

Page(s)

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 29

Ala. Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) ..... *passim*

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490 U.S. 605 (1989) ..... *passim*

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517 U.S. 952 (1996) 17, 51, 55

Cantor v. Personhubballah,
No. 14-518 (Mar. 30, 2015) 1, 12

Clements v. Fashing,
457 U.S. 957 (1982) 59

Clinton v. City of New York,
524 U.S. 417 (1998) 59

Colleton Cnty. Council v. McConnell,
201 F. Supp. 2d 618 (D.S.C. 2002) 29

Davis v. FEC,
554 U.S. 724 (2008) 59

Diamond v. Charles,
476 U.S. 54 (1986) 57

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524 US. 11 (1998) 59

TABLE OF AUTHORITIES
(continued)

Page(s)

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831 F. Supp. 2d 887 (D. Md. 2011)
summ. aff'd, 133 S. Ct. 29 (2012) 30

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 59

Gaffney v. Cummings,
412 U.S. 735 (1973) 41

Georgia v. Ashcroft,
539 U.S. 461 (2003) 55

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 57

Hunt v. Cromartie,
526 U.S. 541 (1999) 30, 34, 41

King v. Illinois State Bd. of Elections,
410 F.3d 404 (7th Cir. 2005) 58

LULAC v. Perry,
548 U.S. 399 31

Martin v. Wilks,
490 U.S. 755 (1989) 60

Meese v. Keene,
481 U.S. 465 (1987) 58

Miller v. Johnson,
515 U.S. 900 (1995) 14, 51

Moon v. Meadows,
952 F. Supp. 1141 (E.D. Va. 1997),
summ. aff'd, 521 U.S. 1113 (1997) 2, 51

TABLE OF AUTHORITIES
(continued)

Page(s)

Rumsfeld v. FAIR,
547 U.S. 47 (2006) 57

Shaw v. Hunt,
517 U.S. 899 & 910 (1996) 41, 43

Shaw v. Reno,
509 U.S. 630 (1993) ..... *passim*

Storer v. Brown,
415 U.S. 724 (1974) 59

Swann v. Adams,
385 U.S. 440 (1967) 59

Tenney v. Brandhove,
341 U.S. 367 (1951) 41

United States v. Hays,
515 U.S. 737 (1995) 23, 60, 61, 63

Wilkins v. West,
264 Va. 447 (2002) 2, 51

STATUTES

28 U.S.C. § 1253 1

Va. Code Ann. § 24.2-305 51

OTHER AUTHORITIES

Jim Nolan, "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch, Aug. 17, 2015 13

BRIEF FOR APPELLANTS

Appellants Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf respectfully request that the Court reverse the three-judge court's opinion and order holding that Virginia Congressional District 3 violates *Shaw v. Reno*.

OPINIONS BELOW

The opinion of the three-judge court of the Eastern District of Virginia is reported at 2015 WL 3604029 (E.D. Va. June 5, 2015) and is reprinted at Jurisdictional Statement Appendix A ("J.S. App."). The court's order is unreported and is reprinted at J.S. App. B.

JURISDICTION

This Court vacated and remanded the three-judge court's first judgment in this case. *Cantor v. Personhubballah*, No. 14-518 (Mar. 30, 2015). The three-judge court's opinion and order on remand issued on June 5, 2015. J.S. App. A-B. Appellants filed their notice of appeal on June 18, 2015. J.S. App. E. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Section 5 of the Voting Rights Act ("VRA"), which are reproduced at J.S. App. C-D.

STATEMENT

A. District 3: A *Shaw* Remedy

District 3 was created as Virginia's only majority-black congressional district in 1991. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court), *summ. aff'd*, 521 U.S. 1113 (1997). In 1997, a three-judge court invalidated that district under *Shaw* and ordered the Legislature to enact "a new redistricting plan" that "conforms to all requirements of law, including the Constitution." *Id.* at 1151.

The Legislature adopted a remedial plan with 50.47% black voting-age population ("BVAP") in District 3. Joint Appendix 580 ("JA"). This 1998 version of District 3 began with portions of Richmond and Henrico County on the northwest end; connected through New Kent, Charles City, Prince George, Surry, and Isle of Wight counties; and used water contiguity to cross the James River and include portions of Newport News, Hampton, and Norfolk. JA 444. The 1998 version was not alleged to violate the remedial order and was used for the 1998 and 2000 elections.

The Legislature enacted a new plan (the "Benchmark Plan") in 2001. Benchmark District 3 retained the Richmond-Norfolk configuration and substantially the same shape as the 1998 version. *See* JA 443, 444. The Benchmark Plan increased District 3's BVAP to 53.1%. JA 140.

The Benchmark Plan was not challenged under *Shaw*, even though Virginia voters mounted *Shaw* challenges to the 2001 House of Delegates and Senate plans. *Wilkins v. West*, 264 Va. 447 (2002).

Benchmark District 3 was surrounded by four districts—Districts 1, 2, 4, and 7—which elected Republicans in 2010. That year, first-time Republican Congressman Appellant Scott Rigell beat a Democratic incumbent in District 2, an evenly divided district politically. JA 640-41, 760-61.

B. The Enacted Plan

In 2011, the Democratically-controlled Virginia Senate approved criteria for the new congressional plan, including achieving "equal population" and VRA compliance; respecting "communities of interest"; and accommodating "incumbency considerations." JA 97-99. After Republicans gained control of the Legislature in 2012, Republican Delegate Bill Janis sponsored the bill that became the Enacted Plan.

Legislative History. Delegate Janis repeatedly stated that his overriding discretionary objective in the Enacted Plan was "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections," when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008). J.S. App. 55a-58a; JA 116, 351, 364, 370, 449. Janis pursued this objective by preserving "the core of the existing" districts "to the greatest degree possible." J.S. App. 55a-58a; JA 116, 351, 352, 364, 372, 383, 449. Moreover, any minimal changes to the existing districts were not politically harmful to incumbents because Janis uniformly accepted "the input of the existing congressional delegation, both Republican and Democrat," in how their districts should be

drawn. JA 117, 118, 352, 365, 367, 369, 371, 372, 373, 381, 451, 453.

Throughout the floor debates, Janis repeatedly and correctly recited that Section 5 of the VRA prohibited "retrogression of minority voter influence" in District 3. J.S. App. 2a, 21a-23a, 55a-61a; JA 124, 350, 356, 362, 364, 368, 369, 449. Janis also stated that complying with this federal non-retrogression mandate was one of the "paramount concerns" in drafting the Enacted Plan. J.S. App. 2a, 21a-23a, JA 356, 369. Janis explained that this federal mandate was "nonnegotiable." J.S. App. 23a; JA 369.

Janis listed "respect[ing] to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections" by preserving "the core of the existing congressional districts" as the highest criterion after the federal equal population and non-retrogression mandates. JA 351, 352-53, 364, 383, 449.

Plan Details. The census data showed Districts 2, 3, 5, 6, 8, and 9 were underpopulated, while all other districts were overpopulated. *See* JA 136. District 2, a coastal district bordering District 3, was the most underpopulated district. *Id.* District 2 was underpopulated by 81,182 people and needed to move inland in order to equalize its population. *Id.* District 3 was underpopulated by 63,976 people. *Id.* District 4 was slightly overpopulated by 11,273 people, but bordered three underpopulated districts, Districts 2, 3, and 5. *Id.*

In the Enacted Plan, District 2 "gained a little bit of population from District 3," but gained "the majority" of its needed population "from District 1."

JA 753. District 2 borders District 4 at Chesapeake, which is the "home base" and residence of District 4's incumbent, Appellant Randy Forbes. *Id.* Moving District 2 into Chesapeake therefore could have placed District 2's incumbent, Appellant Rigell, in the same district as Appellant Forbes, and "certainly would take the base of Congressman Forbes' district away." JA 753-54.

District 3 gained some population from District 2, but "primarily" gained its needed population when it "took the City of Petersburg" from District 4 and "some precincts in Henrico" and "precincts in Richmond" from District 7. JA 754-55.

The Enacted Plan serves Delegate Janis's highest discretionary priorities by strengthening Republican districts, including the districts surrounding District 3; maintaining the 8-3 pro-Republican split; and preserving cores. JA 520-21. In fact, the Enacted Plan was the only plan proposed at the time or in litigation that preserves the 8-3 split. JA 654-62; Appellants' Br. Re. Standing 5-6 (Oct. 13, 2015). For example, Democratic Senator Mamie Locke proposed a 7-4 plan that turned majority-Republican District 4 into a 60% Democratic district. JA 150. Senator Locke's plan also decreased District 3's BVAP to 41.6% in order to increase District 4's BVAP from 33.5% to 51.1%. JA 148.

The Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts, and 83.1% of District 3's core. JA 524. The Enacted Plan also improves upon the Benchmark Plan with respect to compliance with traditional districting principles. For example, the Enacted Plan splits 14 localities

affecting population, compared to 19 locality splits in the Benchmark Plan. JA 803-05. According to Plaintiffs' sole witness at trial, expert Dr. Michael McDonald, the Enacted Plan "score[s] highly" on locality splits. JA 657.

The Enacted Plan's Democratic opponents in the Legislature "had every reason to criticize the Enacted Plan in the harshest terms possible," but never called the Enacted Plan or Enacted District 3 a racial gerrymander. J.S. App. 69a. Rather, they universally criticized it as a partisan gerrymander that protected 8 Republican incumbents. *See id.* 68a-69a. Moreover, prior to being retained as Plaintiffs' expert in this case, Dr. McDonald authored a law review article in which he described the Enacted Plan not as a racial gerrymander, but as a "political gerrymander" that maintained "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." JA 649-50, 663, 667, 694; J.S. App. 48a-53a, 66a-71a; Int.-Def. Ex. 55 at 816. He testified that this reflected how the Enacted Plan was "reported in the popular press" at the time. JA 662-63.

Enacted District 3. Dr. McDonald testified that Enacted District 3 "closely resembles" Benchmark District 3 because it perpetuates the same basic Richmond-Norfolk shape originally adopted as the *Shaw* remedy in 1998. JA 686. To the extent the Enacted Plan made changes to District 3, it treated District 3 the same way as all other districts in the Commonwealth, which are majority-white. The Enacted Plan preserved more of the core of District 3 than of two majority-white districts and made relatively minimal changes to benefit the incumbents

in District 3 and adjacent districts. JA 520-21, 522, 525, 643-649, 761-68.

Enacted District 3 has a 56.3% BVAP. JA 131. The Enacted Plan received preclearance and was used in the 2012 and 2014 elections.

C. Plaintiffs' Lawsuit And Alternative Plan

Plaintiffs did not file suit until October 2013, after this Court's decision in *Shelby County v. Holder*. Compl. ¶ 4. Plaintiffs initially posited that, "in the wake of *Shelby County*, Section 5 cannot justify the use of race" in the pre-*Shelby County* Enacted Plan. *Id.* ¶ 43. The eight Appellants then serving as members of Congress intervened as Intervenor-Defendants. *See* J.S. App. 3a-4a.

Plaintiffs eventually shifted to the theory that the Enacted Plan was not narrowly tailored to comply with Section 5. *Id.* 36a-38a. To support their claim, Plaintiffs produced an Alternative Plan that made changes to Enacted Districts 2 and 3, but no changes to any of the other Enacted Districts. JA 686. The Alternative Plan shifts the boundary between Districts 2 and 3. JA 686.

Alternative District 3 has a 50.1% BVAP. JA 686. By Dr. McDonald's own admission, the Alternative Plan "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" in District 3. JA 686-87. Specifically, Dr. McDonald testified that Alternative District 3 was drawn as a majority-black district for predominantly racial reasons. JA 686-701.

Dr. McDonald also agreed that the Alternative Plan undermines the Legislature's "political goals,"

JA 693, because it transforms District 2, a 50/50 district represented by Appellant Rigell, into a 54.9% "heavily Democratic" district, JA 640-41, 668-70, 697. Dr. McDonald acknowledged that the Alternative Plan performs "significant[ly]" worse than the Enacted Plan on the Legislature's incumbency-protection and core preservation principles. JA 889-90. Specifically, while the Enacted Plan preserves 83.1% of District 3's core, the Alternative Plan preserves only 69.2%, the lowest core-preservation percentage of any district in the Alternative or Enacted Plans. JA 524, 889-90. The Alternative Plan therefore treats District 3 worse than all majority-white districts with respect to core preservation. JA 524, 889-90.

Dr. McDonald pointed out that the Alternative Plan splits one fewer locality than the Enacted Plan, but he agreed that "no principle" says that avoiding locality splits is "more important than" core preservation or incumbency protection. JA 730. Thus, it would have been "reasonable to choose the Enacted Plan over the Alternative Plan" if the Legislature preferred those principles over respecting localities. JA 730.

Dr. McDonald also testified that Alternative District 3 is slightly more compact than Enacted District 3 on certain compactness measures. JA 725-26. Dr. McDonald conceded, however, that these differences—which were as low as .01—"are relatively small" and "not significant under any professional standard." JA 725-26. He also admitted that compactness measures like the ones he invoked are "inherently manipulable" and that there is no

"professional standard" for judging compactness. JA 726.

D. Dr. McDonald's Concessions

Plaintiffs presented at trial an analysis by Dr. McDonald purporting to show that race predominated in the Enacted Plan's changes to District 3. Dr. McDonald conceded, however, that it would have made "perfect sense" for the Legislature to make those changes to District 3 for "*political*" reasons even if every affected voter "was *white*." JA 648-49 (emphasis added). That is because—according to Dr. McDonald—those changes had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts from which "[y]ou could infer" a "political purpose." JA 643-49.

1. Dr. McDonald first examined the population swaps between District 3 and adjacent districts. He opined "that traditional redistricting principles had been subordinated to race" and that the populations moved into District 3 were more black than the populations moved out of District 3. JA 610-15, 669. Dr. McDonald testified that the populations swapped between Districts 2 and 3 had a BVAP difference of approximately 18%; that the populations swapped between Districts 3 and 4 had a BVAP difference of approximately 34%; and that the populations swapped between Districts 3 and 7 had a BVAP difference of approximately 50%. JA 212, 610-15.

Dr. McDonald admitted that he did not conduct *any* political analysis of these swaps. JA 669. Defense expert John Morgan conducted that analysis and presented the results at trial. Mr. Morgan demonstrated that the political differences in the

swaps were "essentially the same" as the racial differences. JA 522, 761-68. Using election results, Mr. Morgan showed that the population moved from District 2 to District 3 was both 18% more black and 17% more Democratic than the population moved from District 3 to District 2. JA 522, 761-68. Similarly, the population moved from District 4 to District 3 was 34% more black and 33% more Democratic than the population moved from District 3 to District 4. JA 522, 761-68. The population moved from District 7 to District 3 was 50% more black and 49% more Democratic than the population moved from District 3 to District 7. JA 522, 761-68. The swaps between Districts 3 and 1 involved populations of different sizes and moved more Democratic voters into District 3 than into District 1. JA 522, 761-68.

Thus, while the swaps increased District 3's BVAP by 3.2%, JA 807, they also increased District 3's Democratic vote share by 3.3%, JA 520-21.

Dr. McDonald agreed with Mr. Morgan's conclusions regarding the political effect of the swaps, conceded that the swaps showed a "clear political effect," and recognized that the swaps would have made "perfect sense" for political reasons even if every affected voter "was *white*." JA 648-49 (emphasis added). These concessions comported with Dr. McDonald's pre-litigation law review article and the racial bloc voting analysis he presented at trial. That analysis conclusively demonstrated that race and partisan affiliation are highly correlated in District 3: according to Dr. McDonald, somewhere between 96.1% and 104.3% of black voters within

District 3 voted for Barack Obama in 2008. JA 280-81, 705-07.

2 Dr. McDonald also conducted a static analysis of the voting tabulation districts ("VTDs") purportedly "included in or left out of" Enacted District 3. JA 614. Dr. McDonald identified VTDs "in the localities that comprise or are adjacent to the [Enacted] Third District" that have a "Democratic performance greater than 55%," which he describes as "heavily Democratic." JA 247, 614-17. He observed that the average BVAP is 59.5% in the 189 such VTDs in District 3 and 43.5% in the 116 such VTDs in adjacent localities, and concluded "that race had trumped politics" in the decision to include or exclude these VTDs from District 3. JA 614.

Dr. McDonald's own data, however, again revealed a political pattern no different from the racial pattern. Dr. McDonald's analysis treats all 55% "highly" Democratic VTDs as equal, even though many are far more Democratic than 55%. JA 678-80. When actual Democratic vote share numbers are considered, "the highly Democratic VTDs within [District 3] had a BVAP 16 percentage points greater [and] performed 15.5 percentage points better for Democrat[s]" than the 55%-Democratic VTDs in adjacent localities. J.S. App. 75a-76a; JA 544-45.

Moreover, Dr. McDonald conceded that 159 of his 189 55% "heavily" Democratic VTDs in District 3 already were included in Benchmark District 3. JA 614. These VTDs already in majority-black District 3 have a higher average BVAP than the 55%-Democratic VTDs that were in surrounding majority-white districts. JA 437-40, 544-45, 614. Reducing

this disparity would have required moving VTDs in "the middle" of District 3 out of that district, which Dr. McDonald conceded could be done only by "dismantl[ing] District 3 and chang[ing] its form quite dramatically." JA 671.

Finally, Dr. McDonald defined the VTDs excluded from District 3 as any VTDs in "localities" adjacent to Enacted District 3. J.S. App. 74a-75a. Some of these VTDs are up to thirty miles away from District 3's boundary and could not be included in District 3 without substantially redrawing districts. *Id.* 75a.

E. Liability Decision

After trial, Judge Duncan, joined by Judge O'Grady, held that Enacted District 3 is an unconstitutional racial gerrymander. Mem. Op. (DE 109). Judge Payne dissented. *See id.* The eight original Appellants appealed to this Court, which vacated and remanded for further consideration in light of *Alabama*. *See Cantor v. Personhubballah*, No. 14-518.

On remand, the majority issued a substantially similar opinion that repeated its conclusion that "partisan politic[s]" and "a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3 in this "mixed motive suit," but nonetheless found a *Shaw* violation. J.S. App. 31a. The majority ordered the Legislature to adopt a remedy by "September 1, 2015." *Id.* 94a. Judge Payne again dissented. *See id.* 45a. Appellants' timely notice of appeal followed.

F. Remedial Proceedings

Governor McAuliffe called the Legislature into a special session to convene on August 17, 2015. The

Senate Democrats, joined by a single Republican, adjourned that session sine die after a few hours. *See* Jim Nolan, "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch, Aug. 17, 2015.

The three-judge court thereafter directed parties and interested non-parties to submit proposed remedial plans. *See* Order (DE 207). The court appointed Dr. Bernard Grofman as a special master to review those proposals and to submit his own proposed remedy. *See* Order (DE 241).

All properly filed proposed remedial plans made at least one Republican district represented by an Appellant majority-Democratic. *See* Appellants' Br. Re. Standing 5-6. The special master's proposed remedial plans unveiled on November 17, 2015 make "major changes in CD3" and "substantial changes in all proximate districts," Final Report 20 (DE 272) ("Rep."), in order to cure purported "fragmentation of minority voting strength . . . in CD4" that Plaintiffs never alleged and purported "packing of minority voting strength . . . in CD3" that Dr. McDonald conceded at trial does not exist, *id.* 65; JA 716. The special master proposes a massive overhaul that splits District 3 in half, lowers its BVAP below the 50% majority level of the Enacted Plan and Plaintiffs' Alternative Plan, and transforms District 4 into a second "minority opportunity" district. Rep. 29. The special master's proposals completely transform District 4—a district with 31% BVAP and 48% Democratic vote share in the Enacted Plan that is currently represented by Appellant Forbes—into a "minority opportunity" and overwhelmingly

Democratic district with more than 40% BVAP and more than 60% Democratic vote share. *See id.* 45, 52.

SUMMARY OF ARGUMENT

1. From the outset, *Shaw* and its progeny have repeatedly emphasized that the Fourteenth Amendment is not violated because race is *a factor* in redistricting, since a legislature is "*always . . . aware* of race when it draws district lines." *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (first emphasis added) (*Shaw I*). The rule could hardly be otherwise because the VRA, particularly Section 5, *requires* that race be a factor by, *inter alia*, providing that covered jurisdictions "*must* . . . preserve existing minority percentages" to the "extent" necessary "to maintain the minority's present ability to elect the candidate of its choice." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015) (emphasis added).

Since race-consciousness in redistricting does not offend the Constitution, the Court has made clear that a *Shaw* "plaintiff must prove that the legislature *subordinated* traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). For essentially the same reason, and because "race and political affiliation" are often "highly correlated," the Court has also repeatedly emphasized that plaintiffs must meet the "demanding burden" of showing that "race *rather than* politics" caused the alleged subordination of neutral principles. *Easley v. Cromartie*, 532 U.S. 234, 241-43 (2001) (*Cromartie II*); *see also Ala.*, 135 S. Ct. at 1270 ("offsetting traditional race-neutral districting principles" include "incumbency

protection" and "political affiliation"). In short, "what predominance is about" is proving that race had "a *direct and significant impact* on the drawing" of the challenged district that "*significantly affect[ed]*" and "*change[d]*" its boundaries compared to what they would have been if race had not subordinated neutral principles. *Ala.*, 135 S. Ct. at 1270-71.

Accordingly, the law could not be clearer: A *prima facie Shaw* violation is established only if race-affected districts—such as minority districts protected by Section 5—departed from the neutral principles that would be used absent racial considerations, and only if such neutral principles were subordinated to "*race*, rather than politics." Thus, the paradigmatic case where a *Shaw* violation cannot conceivably be found is where the districting principles applied to the minority district are the *same* as those applied to majority-white districts and/or where any potential subordination clearly serves the Legislature's "legitimate political objectives." *Cromartie II*, 532 U.S. at 258. In either situation, race has no "significant impact" or potential for "subordination" because any racial goal is coextensive with both the traditional principles neutrally governing all districts and with the legislature's political objectives. Since race therefore causes no departure from the lines that would be drawn absent race, it cannot subordinate those race-neutral line-drawing principles.

The majority below nevertheless found that race "predominated" without finding either that District 3 departed from the neutral principles governing all eleven districts—protecting incumbents by largely preserving the cores of existing districts—or that it in

any way departed from the district shape and demographics that best furthered Republican political objectives. It found such "subordination" merely because the Legislature *correctly recognized* that the federal mandate of Section 5 was "non-negotiable" and "paramount" to the "permissive" goals of incumbency protection, core preservation and politics. But every legislature (and court) familiar with the Supremacy Clause will articulate and abide by that same truism. Thus, acceptance of the majority's "rank ordering" view of subordination will necessarily mean that *every* recognition of the "non-negotiable" VRA will automatically be deemed an impermissibly "predominant" use of race, even where the legislature correctly identifies and scrupulously implements the VRA's requirements. This not only impermissibly converts VRA compliance from a "compelling" *justification* for racial subordination into an automatic *admission* of such subordination, but will gravely deter such compliance efforts since legislatures will know that any acknowledgement of this "non-negotiable" mandate creates *prima facie* liability under *Shaw*.

Moreover, the majority's notion that "race" "predominates" because the VRA's mandate is "paramount" to voluntary state policies has the perverse result of turning *Shaw*'s command of race-neutral treatment into a requirement that minority districts be treated differently and worse than majority-white districts. Under the majority's backward logic, the Legislature could not preserve District 3 pursuant to the incumbency-protection and core-preservation principles governing all majority-white districts because Section 5 also required such

preservation, and this "mandate" "predominated" over the "permissive" preservation policy applied to the majority-white districts.

2. The majority's erroneous notion that "predominance" is established simply because Section 5 ranks higher than the discretionary neutral principles caused it to eschew the analysis and fact-finding that is actually needed to establish "subordination" to "race rather than politics." Contrary to Appellees' constant refrain, this erroneous failure to examine whether race was inconsistent with or subordinated neutral principles or politics is legal error, and correcting that error requires no second-guessing of the majority's fact-finding.

The *majority* found (as it had to) that it was "inarguably correct" that "partisan political considerations, as well as a desire to protect incumbents, played a role in drawing district lines," rendering this a "mixed motive suit" where the "goal of 'producing majority-minority districts'" was "accompanied by other goals, particularly incumbency protection." J.S. App. 31a (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality op.)). Consequently, it was *particularly* necessary to require Plaintiffs to prove that "race rather than politics" or incumbency protection explained District 3, in order to show that "racial" considerations somehow subordinated the neutral factors that concededly "motiv[ated]" the Legislature in drawing that district. But there is nothing in the majority's opinion even hinting that District 3's shape and racial composition was in any way inconsistent with the political or incumbency-protection motives, much

less that these neutral interests were subordinated to race.

Thus, even assuming *arguendo* that the Legislature required an inflexible 55% (or 53%) BVAP "floor," this could not violate *Shaw* because achieving that floor was the best (and, as far as the record reflects, the only) way to accomplish the Legislature's conceded partisan and incumbency protection objectives. Because District 3's shape and racial composition would have been the same if politics and incumbency protection had been the *sole* motives, "race" could not have "subordinated" these coextensive neutral factors or "changed" District 3's shape or racial percentages. Stated differently, because politics and incumbency protection independently required preserving District 3's basic shape and racial percentages, any requirement (or misinterpretation) of Section 5 mandating such preservation could not have been the "predominant" or even "but for" cause of such preservation.

Thus, the majority's basic error was not any fact-finding it made, but the finding it failed to make (or, more accurately, what it failed to require Plaintiffs to prove). The court was plainly required to find some potential inconsistency between the neutral and racial motives, in order to show some potential for racial subordination of those neutral factors, but never engaged in this fundamental analysis.

3. Moreover, had the majority made the requisite inquiry into potential inconsistencies between racial and neutral factors, it could not have found any because the undisputed facts plainly establish that these factors precisely coincided. Most generally, it is

undisputed that the Legislature treated majority-black District 3 the same as all the other, majority-white congressional districts—the Enacted Plan makes only minor changes to district cores and those changes politically benefit incumbents. The fact that all majority-white districts not subject to Section 5 were preserved just like District 3 is, standing alone, virtually conclusive proof that Section 5's requirement to preserve minority strength was consistent with the neutral principles governing all districts.

Moreover, preserving District 3's shape and BVAP was a political and incumbency-protection *necessity* because any serious alteration of the district shape or reduction in BVAP would send a significant number of overwhelmingly Democratic voters into the four adjacent districts, *all* of which had Republican incumbents. For this reason, Dr. McDonald was forced to concede that it would have made "perfect sense" for the Legislature to adopt Enacted District 3 for *political* reasons even if every affected voter "was *white*." JA 649 (emphasis added). That is because—according to Dr. McDonald—the Enacted Plan's trades involving District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts, from which "[y]ou could infer" a "political purpose." JA 643-49. These concessions comported with *all* contemporaneous statements—including Dr. McDonald's pre-litigation law review article—universally describing the Enacted Plan *not* as a racial gerrymander, but as a "political gerrymander" that "protected all incumbents" and preserved "a 8-3 partisan division." JA 649-50, 663,

667, 694; J.S. App. 48a-53a, 66a-71a; Int.-Def. Ex. 55 at 816.

Since *all* agree that preserving District 3's core, as well as its trades with adjacent districts, directly furthered the Legislature's "partisan political considerations" and its "desire to protect incumbents," the majority clearly could not have found any inconsistency, much less conflict, between those neutral factors and Section 5 ("race").

4. More specifically, the majority plainly erred because it found a violation even though conceding that "Plaintiffs failed to produce an . . . alternative plan showing 'that the [L]egislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles,'" because the "alternative plan proffered by Plaintiffs accomplishes a more favorable result for Democrats than does the Enacted Plan." J.S. App. 16a, n.12 (quoting *Cromartie II*, 532 U.S. at 258). Thus, Plaintiffs concededly failed to show that "race rather than politics" explained District 3 because they concededly failed to prove that the Legislature could have accomplished its political goals without engaging in District 3's alleged departure from traditional districting principles. Since District 3 with a 56.3% BVAP is the *only* configuration in the legislative or judicial record which accomplishes the Legislature's goal of retaining all Republican incumbents, the Legislature would have adopted that BVAP regardless of Section 5, in order to re-elect those incumbents. Indeed, Plaintiffs' Alternative *confirms* that reducing District 3's BVAP was not a politically viable option, since its reduction of District 3's BVAP

by only 3% (53.1% to 50.1%) alone converted District 2 from a toss-up district with a Republican incumbent into a "heavily Democratic" district. J.S. App. 88a; JA 521-22, 523, 640-41, 668-70, 697.

The majority sought to justify its naked defiance of *Cromartie II's* express requirement that plaintiffs produce a politically *equivalent* alternative on the grounds that this requirement obtains only if (1) *legislators* testify at *trial* to *confirm* the "assumption that the Legislature's political objective was to create an 8-3 incumbency protection plan" and (2) there is no "direct evidence" of a racial motive. J.S. App. 16a n.12, 35a. Both assertions are contrary to common sense, the express language and reasoning of *Cromartie II*, and the general principle that *Shaw* plaintiffs are obliged to prove that race subordinated neutral principles such as politics.

Finally, Plaintiffs' Alternative was inherently incapable of showing what political goals could be accomplished *without* racial subordination, because Alternative District 3 concededly "subordinated traditional districting principles to race" to meet a 50% BVAP "quota." JA 686-87. The majority gave no reason for violating *Cromartie II*'s express requirement of a race-neutral alternative with a "significantly greater racial balance," but, rather, blithely found a *Shaw* violation based on an alternative that concededly constituted a *Shaw* violation.

5. The majority misapplied the Court's decision in *Alabama* when it held that Enacted District 3 was not narrowly tailored to its acknowledged objective of satisfying "the compelling state interest of

compliance with Section 5." J.S. App. 37a. Of all the alternatives proposed at the time or in litigation, the Section 5-compliant Enacted Plan *best* advances the Legislature's core-preservation and incumbency-protection priorities and, thus, *least* subordinates traditional principles to race.

Obviously, the best course is to minimize the inherent tension between the race-conscious demands of the VRA and *Shaw's* race-neutral command by choosing the Section 5-compliant option that is most consistent with the neutral factors governing all districts. As *Alabama* emphasized, it is for legislatures to determine how to best comply with Section 5, so long as they have a "good reason" for selecting the compliant option; they are not required to do only that which is absolutely necessary under Section 5, and no more. 135 S. Ct. at 1274. Here the Legislature had very "good reason[s]" for eschewing the option endorsed by the majority; *i.e.*, reducing BVAP to the point where a "voting analysis" shows that minorities' ability to elect would not be diminished. J.S. App. 9a-10a, 39a-42a. It is undisputed that any such voting analysis would have purportedly "shown" that District 3's BVAP could be reduced to "*30%*" without diminishing the ability to elect, which could only be accomplished by dramatically subordinating core-preservation and incumbency-protection principles, since it would require a massive redraw of this entire area of the state. Moreover, in the real world, it would be extraordinarily difficult, if not impossible, to convince the Justice Department that this massive BVAP reduction somehow did not diminish minorities' ability to elect.

6. As Defendants concede, Appellants have standing to appeal because the judgment necessarily requires transforming at least one Appellant's majority-Republican district into a majority-Democratic district. For example, the special master's proposals reconfigure District 4—a 48% Democrat district currently represented by Appellant Forbes—into an overwhelmingly Democratic district with more than 60% Democratic vote share.

Indeed, Appellants have the same standing they would have if one resided in District 3, because any remedy affects incumbents in the districts surrounding District 3 to the *same extent* as it affects District 3's incumbent. In particular, the judgment requires a remedy that moves black (and overwhelmingly Democratic) voters from District 3 into surrounding Republican districts, and an equal number of non-black (and far less Democratic) voters into District 3 from those districts. Appellants therefore have established the kind of "personal" injury, *United States v. Hays*, 515 U.S. 737 (1995), and "direct, specific, and concrete injury" from the "judgment" that confers standing to appeal, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989).

ARGUMENT

An analogous hypothetical will illustrate the majority's fundamental error. Assume there is a 55% BVAP district totally contained within a 55% BVAP county and the only way to reduce the BVAP would be to cross the county line to pick up white population from the adjacent county. Preserving the district at 55% BVAP by keeping it within the county obviously would not subordinate traditional

districting principles to race, because this option better adheres to the principle of preserving county lines and because the BVAP would have been maintained under that neutral principle, regardless of any racial considerations. Consequently, it is irrelevant whether preserving the district's 55% BVAP was a "non-negotiable" principle "paramount" to preserving county lines, because that racial principle is coextensive with the county line principle, and thus there would be no occasion to choose which should "predominate."

Here, the dominant principle indisputably governing all districts was preserving district cores with only minimal, politically beneficial changes to protect the 8 Republican and 3 Democratic incumbents. Thus, if everyone in District 3 was white, the Legislature would have preserved District 3's core and certainly would have never altered it in a way that sent a significant number of Democratic voters to adjacent districts, because that would directly threaten the re-election prospects of the Republican incumbents residing in all four surrounding districts. Preserving District 3's shape and BVAP was the only way to avoid this incumbent-threatening Democratic exodus, and thus plainly would have been done regardless of any racial considerations. Accordingly, as in the hypothetical, even assuming the Legislature had a firm policy of not reducing District 3's BVAP below 55% (or 53%), this policy could not have "significantly affected" the district's configuration or "subordinated" neutral districting principles: the district would have had the same configuration and BVAP regardless of any BVAP floor, in order to comply with the governing

principle of incumbency protection through core preservation. The majority's failure to even address, much less refute, this dispositive point was clear legal error.

I. THE MAJORITY FAILED TO APPLY *ALABAMA* AND *CROMARTIE II*

Because a legislature "always is *aware* of race when it draws district lines" and such awareness "does not lead inevitably to impermissible race discrimination," *Shaw I*, 509 U.S. at 646, *Shaw* plaintiffs bear the "demanding" burden to prove much more than that the legislature considered race, *Cromartie II*, 532 U.S. at 241. Rather, *Shaw* plaintiffs must prove that the legislature "subordinated" traditional principles—including the "offsetting" "race-neutral districting principles" of "incumbency protection" and "political affiliation"—to "racial considerations." *Ala.*, 135 S. Ct. at 1270. Since "race" cannot even theoretically "subordinate" a traditional principle absent a *conflict* between the two, plaintiffs' threshold burden is to establish such a conflict. *Id.* Thus, *Shaw* can be violated only where race had "a *direct and significant impact* on the drawing" of the challenged district that "*significantly affect[ed]*" and "*change[d]*" the district's boundaries compared to what they would have been if race had not subordinated traditional principles. *Id.* at 1266, 1270-71 (emphases added). But such a racially-driven "impact" is possible only if a conflict between race and neutral principles exists because, absent such a conflict, race and traditional principles independently would have led the legislature to adopt the same redistricting plan. *Id.* Moreover, because race and political affiliation are "highly correlated,"

redistricting decisions with a racial impact also carry a political impact, so plaintiffs bear a particular burden to decouple race from politics, to prove that the legislature subordinated traditional principles to "race *rather than* politics." *Cromartie II*, 532 U.S. at 243.

This requirement to show a conflict between race and traditional principles was particularly obvious and dispositive here. The majority *conceded* that "partisan politic[s]" and "a desire to protect incumbents" "inarguably" "played a role in drawing" the Enacted Plan in this "mixed motive suit." J.S. App. 31a. It therefore was particularly important to show that the alleged "racial" motive subordinated these neutral factors and thereby "changed" District 3's boundaries.

1. Yet, remarkably, the majority found a *Shaw* violation without finding any *inconsistency* between race and politics or protecting incumbents, much less that race predominated over these race-neutral factors. The reason there is no such finding is because none is possible: the *undisputed* evidence established that preserving the core of District 3, and all minor adjustments to it, directly furthered the Legislature's political and incumbency-protection goal of maintaining 8 Republican incumbents. Thus, even if the Legislature had a racial reason for preserving and making minor adjustments to District 3, it also had coextensive *non*-racial reasons. Since these race-neutral reasons *coincided* with any racial reason, it is not possible that race *subordinated* them or that race "affected" District 3's shape or demographics.

2. The majority also ignored *Cromartie II*'s specific directive on *how* plaintiffs must prove that race predominated over non-racial factors. *Shaw* plaintiffs must produce an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and "traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. 532 U.S. at 258. The reason for this requirement is obvious. If plaintiffs cannot produce an alternative free from racial predominance that achieves the legislature's political (and other traditional) objectives, they have failed to prove that politics is not the cause of the district's shape and demographics. If the political goals can reasonably be accomplished only through the district chosen by the legislature, race cannot be the predominant factor because the district would have been created even absent racial considerations, in order to accomplish the desired political result.

The majority, however, found a *Shaw* violation even though Plaintiffs produced no such alternative. To the contrary: Plaintiffs' majority-black Alternative District 3 concededly contravenes the Legislature's political objectives by converting a Republican incumbent's adjacent district into a "heavily Democratic" one and concededly contravenes the Legislature's race-neutral incumbency-protection and core-preservation priorities. Moreover, it concededly embodies the racial flaws that purportedly infected the enacted district—in Dr. McDonald's words, "subordinat[ing] traditional districting principles to race" to achieve a "50%" black "quota." JA 686-87. Plaintiffs' failure to show that the Legislature's political objectives could be accomplished through

any alternative means (much less a non-subordinating alternative) establishes that Enacted District 3 is the *only* means of accomplishing them (and therefore that politics necessarily predominates over race).

The majority blithely suggested that the dissent's criticism that Plaintiffs' Alternative Plan produced only a 7-4 Republican ratio "relies on an *assumption* that the legislature's objective was to create an 8-3 incumbency protection plan." J.S. App. 16a n.12 (emphasis added). But the "assumption" that the Republican-controlled Legislature wanted to protect Republican incumbents is compelled by common sense and is the very assumption underlying *Cromartie II*. *See* 532 U.S. at 242, 258. And it is not even an "assumption" because (1) the majority itself *found* that "protecting incumbents" motivated the Legislature; (2) Delegate Janis repeatedly *stated* this objective; (3) every contemporaneous commentator (including Dr. McDonald) acknowledged it; and (4) the Enacted Plan has the clear *effect* of maintaining the 8-3 split. *See* J.S. App. 48a-53a; 68a-71a; *supra* pp. 3-7.

3. The majority nonetheless rested its finding that race "predominated" on the unremarkable fact that "race" was a *higher-ranked* criterion than the neutral criteria. J.S. App. 2a, 21a-23a. Specifically, the majority found that Delegate Janis's correct recitation that Section 5 prohibited "retrogression [of] minority voting influence" in District 3 was a racial purpose. *Id.* 2a, 21a-23a. It then opined that this "racial" purpose "predominated" because Delegate Janis correctly noted that this *federal* mandate was "nonnegotiable" and "paramount," while *state-law*

neutral principles were merely "permissive." *Id.* 2a, 21a-23a. This tautology is facially erroneous and would automatically invalidate all legislative and *judicial* redistricting in Section 5 jurisdictions, because *every* such jurisdiction acknowledges the Supremacy Clause truism that Section 5's *federal mandate* is paramount to *all* traditional principles, since all are "permissive." *See Abrams v. Johnson*, 521 U.S. 74, 96 (1997); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 636 (D.S.C. 2002) (three-judge court).

First, even if the Legislature had announced that it would not allow District 3's BVAP to go below 55% for reasons *unrelated* to Section 5, this would not suggest that it subordinated neutral principles to race. *Cromartie II*, 532 U.S. at 253. Such "direct evidence" of a desired "racial balance" "says little or nothing about whether race played a *predominant* role comparatively speaking." *Id.* That comparative predominance analysis can only be resolved under the *Cromartie II* methodology eschewed by the majority; *i.e.*, by determining whether plaintiffs have eliminated politics and traditional principles as explanatory variables by showing that those objectives conflicted with achieving the desired "racial balance" and could be accomplished through an alternative with a "significantly different racial balance."

Particularly since race and politics are so "highly correlated" in Virginia (and elsewhere), it is quite plausible that the BVAP resulting in Enacted District 3 directly furthers the Legislature's political interests and would be pursued absent any "racial" motive. *See id.* at 245. If, as here, plaintiffs do not satisfy

their burden of negating that plausible scenario, they have not shown that "race rather than politics" explains the district, *regardless* of whether the Legislature rank-ordered "race" above "politics." Here, Plaintiffs *confirmed* that *politics does* explain maintaining District 3's BVAP. Plaintiffs' Alternative Plan's modest 3% reduction in District 3's BVAP turned neighboring District 2, a toss-up district represented by Appellant Rigell, into a 54.9% "heavily Democratic" district, creating a 7-4 partisan division. JA 520-21, 522, 640-41, 668-70, 697; J.S. App. 88a.

That being so, it does not matter whether the racial factor is ranked above the non-racial principle because they both head in the same direction, and thus there will be no need to choose *between* these *non-conflicting* factors. *See Ala.*, 135 S. Ct. at 1266-71; *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (legislature may subordinate traditional principles to gerrymander (or support) Democrats "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact") ("*Cromartie I*"); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901 (D. Md. 2011) (three-judge court) *summ. aff'd*, 133 S. Ct. 29 (2012). Indeed, finding that "race"—*i.e.*, Section 5 compliance—"predominated" because it was a "nonnegotiable" criterion "superior" to "permissive" neutral principles is just as illogical as finding that "race" did *not* predominate because the neutral "nonnegotiable" *constitutional* requirement of population equality is "superior" to Section 5's *statutory* requirements. *See Ala.*, 135 S. Ct. at 1270-72.

Second, the majority's analysis is at war with this Court's treatment of VRA compliance under *Shaw*. The Court treats VRA compliance as a governmental interest so compelling that it even justifies subordination of neutral principles to race. J.S. App. 37a-38a.[1] This rule recognizes that legislatures must be provided some way of complying with the potentially conflicting demands of the race-conscious VRA and the race-neutral Fourteenth Amendment. *See Ala.*, 135 S. Ct. at 1274. The majority turned this principle on its head. The majority squarely found, as a factual matter, that "the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5." J.S. App. 37a. But it improperly converted this compelling interest sufficient to *justify* racial subordination into a direct *admission* of such subordination.

Far from reconciling the conflicting demands of the VRA and the Fourteenth Amendment, the majority's approach places them in irreconcilable conflict by treating any effort at VRA compliance as a *prima facie* Equal Protection violation, even if such compliance causes no departure from what race-neutral policies would have dictated. Importantly, this is true even if the legislature correctly understands the VRA's requirements and narrowly tailors its plan to achieve such compliance. Such a "narrowly tailored" plan has the same *purpose* as the Legislature here—Section 5 compliance—and it is

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[1] Eight justices have so recognized. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 475 n.12, 485 n.2, 518 (2006).

this "racial" purpose the majority says "must" be subjected to "strict scrutiny." *Id.* 36a-40a; *see also id.* 18a n.13 ("The fact that the legislature considered race a predominant concern only because it believed federal law compelled it to do so is of no current legal consequence."). Thus, even a legislature that correctly understands and implements Section 5's non-retrogression requirements has committed a *prima facie* violation, because Section 5 "predominates" over voluntary neutral principles. Under this regime, then, all *Shaw* cases bypass the demanding *prima facie* showing and turn entirely on whether defendants have satisfied the "narrowly tailored" prong of strict scrutiny.

4. Finally, the majority violated *Shaw* by converting its racial-equality command into a requirement to treat minority districts differently and worse than majority-white districts. There is no dispute that the Legislature treated majority-black District 3 the same as all of the other, majority-white congressional districts—the Enacted Plan makes only minor changes to district cores and those changes politically benefit incumbents. The fact that all majority-white districts not subject to Section 5 were preserved just like District 3 underscores that Section 5's requirement to preserve minority voting strength was consistent with the neutral principles governing all districts. Under the majority's backward logic, however, the Legislature was precluded from doing the same incumbency protection in District 3 that it voluntarily did in the majority-white districts, because Section 5's preservation command "predominated" over this "permissive" preservation policy.

Accordingly, the majority requires treating minority districts and incumbents worse than their white counterparts, because it precludes preserving such Section 5-protected districts in the same way as majority-white districts unprotected by Section 5. The Fourteenth Amendment and *Shaw* obviously cannot require treating certain districts worse because of their predominantly minority racial composition. *See Ala.*, 135 S. Ct. at 1270.

The majority then exacerbated this perversion of *Shaw* by using Plaintiffs' Alternative Plan—which concededly "subordinates traditional districting principles" to achieve a 50% black "quota"—as the principal proof that District 3 shared these defects, without evaluating whether a district where race did *not* predominate would have equally complied with the Legislature's non-racial goals. Thus, the majority converts the *Shaw* inquiry from whether a majority-minority district subordinated traditional principles relative to one not infected by race into a "beauty contest" between two majority-minority districts where the "winner" is the one that (marginally) better complies with the *court's* view of proper districting principles and *plaintiffs'* political goals, although it is concededly worse in terms of the Legislature's preferred race-neutral principles. This obviously does nothing to further racial neutrality, but simply substitutes one racially-driven district that *contravenes* the Legislature's political desires for one that furthers them. *Shaw* obviously does not authorize, much less require, the federal judiciary to hand the minority party a political victory in court that it could not secure through the democratic process.

II. THE MAJORITY ERRED IN FAILING TO REQUIRE PROOF THAT RACE RATHER THAN POLITICS PREDOMINATED

A more detailed discussion confirms the majority's error in finding a *Shaw* violation without finding that race conflicted with "incumbency protection" and "political affiliation," *Ala.*, 135 S. Ct. at 1270, and that "race *rather than* politics" predominates in Enacted District 3, *Cromartie II*, 532 U.S. at 243; *see also Cromartie I*, 526 U.S. at 551. After finding that "protecting incumbents" and "political considerations" "inarguably" "motiv[ated]" the Legislature, J.S. App. 31a, the majority failed to resolve whether Plaintiffs had disproved their predominance over race. Instead, it contented itself with the observation that politics *might* not have predominated because the Legislature's acknowledged political purposes "*need not* in any way refute the fact that race was the legislature's predominant consideration." *Id.* 32a (emphasis added). But the truism that politics "need not" be the Legislature's purpose is no substitute for the requisite finding that it *was not*, particularly since consideration of *race* "need not in any way refute the fact that" *politics* was "the legislature's predominant consideration." *Id.* It is precisely because race and politics are invariably present in redistricting and "highly correlated" that this Court requires plaintiffs to prove *which* factor predominated. *Cromartie II*, 532 U.S. at 242.

A. The Undisputed Facts Establish That Politics Explains District 3

The majority *could not* have made the required finding because it is *undisputed* that:

- All contemporaneous commentators—including Plaintiffs' expert—described the Enacted Plan as a "political gerrymander" that maintained "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." JA 649-50, 663, 667, 694; J.S. App. 48a-53a, 66a-71a;
- *Every* piece of electoral data confirms that the Enacted Plan has this "clear political *effect*." JA 643-49 (emphasis added);
- *Plaintiffs'* expert, Dr. McDonald, agreed that it would have made "perfect sense" to adopt the Enacted Plan for *political* reasons even if every affected voter "was white." JA 648-49;
- The Legislature's treatment of District 3—preserving its core with minimal politically-motivated changes—was to the same as its treatment of the majority-white districts;
- Delegate Janis repeatedly stated that protecting incumbents and perpetuating the 8-3 split were the Enacted Plan's goals;
- Delegate Janis disclosed that the plan uniformly followed incumbents' "specific and detailed recommendations" for their own districts. JA 451; *see also* JA 117, 118, 352, 365, 367, 369, 371, 372, 373, 381, 451, 453;
- No alternative plan preserves the 8-3 split and protects all incumbents; and

- Any effort to significantly adjust District 3's racial composition would spread Democrats into the adjacent districts and harm Republican incumbents.

See supra pp. 3-12.

The undisputed evidence more than confirms Dr. McDonald's concessions about the Enacted Plan's political effect—and underscores that the majority could *not* have found racial predominance. The 2010 elections resulted in the 8-3 partisan split—and *preserving* District 3's core was needed to freeze that split. Also, as Dr. McDonald conceded, the relatively minor *changes* to District 3 were all "politically beneficial" to the Republican incumbents in adjacent districts because they moved Democrats out of, and Republicans into, those districts. JA 643-49. Indeed, the Enacted Plan increased District 7's Republican vote share by 2.4%, District 1's by 1%, District 4's by 1.5%, and toss-up District 2's by 0.3%. JA 520-21.

The majority's finding that the swaps involving District 3 and surrounding districts had a racial effect, J.S. App. 32a, does not remotely suggest otherwise, because they had a virtually identical *political* effect. District 3's 3.2% BVAP increase mirrors its 3.3% increase in Democratic vote share. JA 520-21. This is also true of District 3's swaps with *all* adjacent districts. The swaps between Districts 2 and 3 had a 17% Democratic vote share difference and an 18% BVAP difference. *See* JA 522, 761-68. The swaps between Districts 3 and 4 had a 33% Democratic vote share difference and a 34% BVAP difference. *See* JA 522, 761-68. The swaps between Districts 3 and 7 had a 49% Democratic vote share

difference and a 50% BVAP difference. *See* JA 522, 761-68. (The swaps between Districts 3 and 1 involved populations of different sizes and moved more Democratic voters into District 3 than into District 1, thereby reflecting the same incumbency-protection effect as the other swaps. *See* JA 522, 761-68.) Accordingly, contrary to the majority's assertion, the Enacted Plan, just as in *Cromartie II*, "furthered the race-neutral political goal of incumbency protection to the same extent as it increased the proportion of minorities within the district." J.S. App. 32a.

B. The Legislative History Demonstrates That Politics Explains District 3

The fact that politics explains Enacted District 3 is unsurprising because Delegate Janis *expressly said so* repeatedly, in a display of candor rarely seen in redistricting. *See* J.S. App. 54a-62a; JA 116, 351, 364, 370, 449. Delegate Janis said his overriding objective was "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election," when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008). J.S. App. 55a-58a; JA 116, 351, 364, 370, 449. Accordingly, the Enacted Plan preserved "the core of the existing" districts "to the greatest degree possible." J.S. App. 55a-58a; JA 116, 351, 352, 364, 372, 383, 449. Moreover, any minimal changes were not politically harmful to incumbents because Delegate Janis strictly adhered to "the input of the existing congressional delegation, both Republican and Democrat," in how their districts should be drawn.

JA 117, 118, 352, 365, 367, 369, 371, 372, 373, 381, 451, 453.

Janis candidly noted that "the district boundary lines were drawn in part on specific and detailed recommendations" from "each of the eleven members currently elected to [C]ongress," including Congressman Scott in District 3. JA 451. After the Enacted Plan was drawn, Janis "spoke[] with each" incumbent and "showed them a map of the lines." *Id.* "[E]ach member of the congressional delegation both Republican and Democrat has told me that the lines" conform to "the recommendations that they provided me, and they support the lines for how their district is drawn." JA 352, 451; J.S. App. 56a. Consequently, *every* contemporaneous commentator—including Democratic opponents and Dr. McDonald—described the Enacted Plan as a "partisan gerrymander" that preserved the 8-3 split and "protected all incumbents." JA 649-50, 663, 667, 694; J.S. App. 48a-53a, 66a-71a.

Thus, all contemporaneous legislative history and Plaintiffs' own concessions uniformly confirm that Enacted District 3 directly served the Legislature's political interests of returning 8 Republicans to Congress. Unable to dispute this, the majority hinted (although it could not actually find) that, for the first time in American history and for some wholly unexplained reason, a legislature did not want to re-elect congressional incumbents of the majority party. It so concluded because Janis's statements were "rather ambiguous," and because Janis did not personally consider "partisan performance" statistics, show "the *entire* 2012 Plan" to incumbents, or consult incumbents' prospective "*challengers*." J.S. App. 33-

34a (emphasis added). Delegate Janis, however, had no need to consider "partisan performance" statistics because the incumbents who effectively drew their own districts considered such performance, and their self-interested approval of their own districts added up to a *statewide* incumbency protection plan across "the entire" Enacted Plan. And, of course, failure to consult incumbents' *challengers* only confirms that the purpose was to protect incumbents. Janis's statements are not remotely "ambiguous" about incumbency protection, particularly since objective electoral data confirmed that the Plan would have precisely such an "effect" (as it did in 2012 and 2014).

III. PLAINTIFFS DID NOT PROVE THAT RACE RATHER THAN POLITICS PREDOMINATED

The majority attached talismanic significance to Delegate Janis's statements that his "paramount" concern was to avoid "retrogression." As noted, this is error for two reasons.

First, even racial goals *unconnected* to the VRA do not establish that "race *rather than* politics" subordinated traditional principles. *Cromartie II*, 532 U.S. at 243. Such a *prima facie* case requires demonstrating that the legislature "could have achieved its legitimate political objectives" with an alternative plan where race did not predominate. *Id.* at 258. This is because "direct evidence" of a racial motive "says little or nothing about whether race played a *predominant* role comparatively speaking." *Id.* at 253. Thus, even if the Legislature had established a BVAP floor unconnected to the VRA, there is no *prima facie* case because there is

concededly no showing or finding that this "changed" what the Legislature would have done if politics had been its sole motive. *Ala.*, 135 S. Ct. at 1270.

In any event, Janis's statements *correctly* recited Section 5's VRA requirements, which is not an admission that race predominated, but instead simply an acknowledgment that federal law predominates over state law.

A. The Majority Erred In Failing To Require Plaintiffs To Produce A Politically Equivalent Alternative

Even assuming the Legislature decided that a 55% BVAP level was needed to avoid retrogression in a 53.1% BVAP district, that would not establish a *prima facie Shaw* violation because the majority made no finding and required no proof that the Legislature's political objectives could have been achieved at a lower BVAP.

Cromartie II requires a plaintiff to produce an alternative plan that "achieve[s] [the legislature's] political objectives in alternative ways" free of the alleged subordination of traditional principles to race. 532 U.S. at 258. Here, however, the majority found a violation although Plaintiffs' Alternative Plan *concededly* undermines the Legislature's "political goals" because it transforms District 2 into a "heavily Democratic" district and produces a 7-4 partisan split. JA 640-41, 668-70, 693, 697.

The majority sought to justify its facial defiance of *Cromartie II*'s explicit requirement of a politically equivalent alternative on two bases. *First*, plaintiffs purportedly need not produce such an alternative in their *prima facie* case unless the defendant (in

rebuttal) proves through "overwhelming evidence," including "trial testimony by state legislators," that the legislature had "political objectives." J.S. App. 32a-33a. Absent such testimony, the majority could not engage in the "assumption" that the Legislature wanted to return all 8 Republican incumbents to Congress. *Id.* 16a n.12.

But *Cromartie II* "*generally*" requires *all* plaintiffs "at the least" to disprove politics (where it highly correlates with race), 532 U.S. at 258 (emphasis added), precisely because of the "assumption" that "[p]olitics and political considerations are inseparable from districting," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). This *prima facie* burden clearly does not depend on the defendant's *rebuttal* evidence, much less "trial testimony by state legislators." The absence of any need for trial testimony is particularly obvious where, as here, the *contemporaneous* legislative history evinces a clear 8-3 incumbency-protection purpose, *see supra* Part II.B—which is presumably why *Plaintiffs* offered no legislator testimony to support their racial theory. Defendants obviously are not required to waive legislative privilege, *Tenney v. Brandhove*, 341 U.S. 367 (1951), to trigger the *Cromartie II* burden, and such post-hoc testimony is far less probative of "the legislature's actual purpose" than statements that were "before the General Assembly when it enacted" the Plan, *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 & 910 (1996) (*Shaw II*); *Cromartie I*, 526 U.S. at 549 (political data and expert testimony "[m]ore important" than after-the-fact legislator testimony).

Indeed, the majority's *Cromartie II* citation does *not* refer to legislator testimony, but instead to the

political explanation offered by "the State," where "the key evidence consisted primarily of documents and expert testimony." 532 U.S. at 242, 243.

Second, the majority contended that plaintiffs are relieved of their *Cromartie II* burden where there is "direct evidence" of an alleged racial objective in the legislative history. J.S. App. 35a. To the contrary, *Cromartie II* establishes that "direct evidence" that (unlike here) explicitly requires, for example, a specific "racial balance" in the challenged plan, is barely probative because it "says little or nothing about whether race played a *predominant* role comparatively speaking." 532 U.S. at 253. The majority thus has it precisely backwards. *Cromartie II* insisted on plaintiffs producing an alternative that was politically equivalent and had a "significantly different racial balance" than the challenged district(s), precisely because even direct pronouncements about racial purposes do not remotely resolve the dispositive question whether such purposes, "*rather than* politics," explain the district. That comparative predominance issue can only be resolved by examining whether political goals could be accomplished without the allegedly racially motivated distortions. Yet the majority ruled that such "direct evidence" on race *forecloses* this essential relative predominance inquiry.[2]

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[2] The majority also said that Plaintiffs' *Cromartie II* burden may be satisfied by something other than an "alternative *plan*." J.S. App. 16a n.12 (emphasis added). While this may theoretically be true, Plaintiffs' chosen alternative *was* a plan, and it is quite difficult to *envision* an "alternative" other than a plan,

B. Delegate Janis's Statements Do Not Show Racial Predominance

The majority repeatedly contended that race "predominated" because of legislative statements that "one of the paramount concerns" upon which the Legislature was "most especially focused" was not to violate "nonnegotiable" Section 5 by "retrogress[ing] minority voting influence" in District 3. J.S. App. 2a, 8a, 21a-23a; *see also id.* 8a (Democratically-authored Senate Criteria recognizing "priority" of "mandatory" VRA over "permissive" state law). But the assertion that Section 5 mandatorily prohibits "retrogress[ing] minority voting" power is a routine and correct recitation of that federal non-retrogression command. *See* J.S. App. 2a, 21a-23a, 55a-61a; JA 124, 350, 356, 362, 364, 368, 369, 449. These *echo* the Court's description of Section 5's requirements. *See Ala.*, 135 S. Ct. at 1274.[3]

At points, the majority sought to convert this correct view of Section 5 into a reflexive BVAP "floor" analogous to *Alabama*. J.S. App. 20a-21a. But the majority's selective recitation of the record fails to

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particularly since the majority does not identify any such "alternative." *Id.*

[3] Thus, the majority's attempt to analogize to *Shaw II* is clearly off-base. J.S. App. 35a-36a. The "overriding purpose" in *Shaw II* reflected an *inaccurate* construction of the VRA (because it interpreted Section 5's *non-retrogression* command as requiring *additional* minority districts), and the State conceded that the challenged district racially subordinated traditional principles, including "incumbency protection." 517 U.S. at 906, 912-13. Here, Janis's statements *accurately* construe the VRA, and "race" is coextensive with incumbency protection.

establish the existence of any 55% BVAP "floor" or any racial subordination of traditional principles. First, the majority rips out of context Delegate Janis's response to a question on the House floor. *Id.* 21a. The discussion was about whether the Legislature should adopt Senator Locke's plan, which reduced *District 3's* BVAP to around *41%* in order to raise the BVAP in adjacent *District 4* to 51%. *See id.* A Democratic legislator asked for "empirical evidence" that "55% BVAP is different than 51% or 50%" or whether 55% was "just a number that has been pulled out of the air," to which Janis responded regarding "weighing a certainty against an uncertainty." J.S. App. 21a; JA 397. Thus, Janis was explaining that the Enacted Plan with "about 56%" BVAP in majority-black District 3 was "certain" to receive preclearance, while reducing District 3's BVAP "from 56 percent African-American population to 40 percent" would be "uncertain" to receive preclearance, because it created "a reduction in minority voter influence in the 3rd Congressional District." JA 394-98. Contrary to the majority's false implication about this discussion concerning *District 4*, Janis was plainly not saying that he would not reduce District 3's Benchmark BVAP (which was 53.1%, not 55%) to 50% or 51%. *See* JA 394-98.

The majority invents another statement by Janis when it suggests that he "emphasized that his 'primary focus' . . . was ensuring that the Third Congressional District maintained at least as large a percentage of African-American voters as had been present in the district under the Benchmark Plan." J.S. App. 22a. But the end of the majority's sentence is not in quotation marks because Janis never said

"maintained at least as large a percentage"—those words are purely the majority's. Rather, Janis simply repeated the Section 5 truism that "the primary focus . . . was to *ensure that there be no retrogression in the Third Congressional District*." JA 369 (emphasis added).

Unable to twist Delegate Janis's statements into admissions of a 55% BVAP "floor," the majority contended that defense expert John Morgan "acknowledged that the legislature adopted" a 55% BVAP "floor" for Enacted District 3. J.S. App. 20a-21a. If Mr. Morgan had said this, it would not reflect the Legislature's purpose or "direct evidence" of any kind, because, as the majority itself notes, he "did not work with or talk to any members of the Virginia legislature" regarding the Enacted Plan. *Id.* 21a n.16. Anyway, Mr. Morgan never suggested any 55% quota; he simply noted that the *state* redistricting plan enacted in *2011* (with a Democrat-controlled Senate) contained 55% BVAP districts and enjoyed bipartisan and biracial support, which provided the Legislature a strong basis for believing that a district with a similar BVAP, far from over-concentrating black voters, was a legitimate option for achieving Section 5 preclearance. *See id.* 66a-67a.[4]

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[4] Unable to find a *55%* floor, the majority inconsistently suggests there was a *53.1%* floor by citing a lone statement where Janis said that "[w]e can have no less" BVAP "percentage of African-American voters than percentages that we have under the existing lines." J.S. App. 22a; *see also* JA 119-20, 357. But Janis hastened to point out that the lines in Enacted District 3 also were drawn "not to disrupt the lines of the current districts any more than you have to given population

In short, the use of purportedly "direct evidence" here vividly exemplifies why *Cromartie II* eschewed such evidence in favor of the plaintiffs' politically equivalent alternative.

C. Plaintiffs' VTD Analysis Cannot Show Racial Predominance

The *only* evidence the majority analyzed that is even relevant to whether race or politics explains District 3 was Dr. McDonald's VTD analysis. The majority relied on this analysis to support its assertion that the "population swaps and shifts used to create the Third Congressional District suggests that less was done to further the goal of incumbency protection than to increase the proportion of minorities within the district." J.S. App. 34a. This completely misportrays Dr. McDonald's analysis, which had nothing to do with "population swaps and shifts" between District 3 and adjacent districts, and, anyway, the analysis embodies precisely the same

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shifts, et cetera," JA 119-20, and that he took into account the "recommendations" of "Congressman Scott in the 3rd Congressional District," JA 359-60. Thus, Janis confirmed that the Legislature would have drawn the lines exactly the same way *regardless* of race. *See id.*

The majority also contends that *Appellants* said *Defendants* conceded the existence of a BVAP floor. J.S. App. 20a-21a. But Appellants were describing *Plaintiffs'* concession that race was considered to achieve Section 5 *compliance*, thus foreclosing any finding that the Enacted Plan was based on "an *improper* consideration of race." JA 7-9 (emphasis added); J.S. App. 20a-21a. Anyway, this statement was not uttered by Defendants, and *post hoc* litigation statements by strangers to the redistricting process are plainly irrelevant. J.S. App. 48a n.34.

flaws as a report rejected as clearly erroneous in *Cromaritie II*.

First, Dr. McDonald concededly did not analyze VTD swaps but looked at *all* VTD's over "55%" "Democratic," *not* just those which had been "swapped" to create the challenged District 3. JA 247, JA 613-17. Indeed, *159* of Dr. McDonald's *189* 55% Democratic VTDs in District 3 *already* were included in *Benchmark* District 3. JA 247, 614-17. Thus, this static VTD analysis "proves" only what the Legislature *stated* it was doing—preserving District 3's core—but says nothing about whether the 2012 version of District 3 was racial rather than political. Of course, VTDs in majority-black Benchmark District 3 necessarily have a much higher BVAP than those located in the surrounding majority-white Benchmark districts. JA 437-40, 544-45. Reducing this disparity would have required moving VTDs in "the middle" of District 3, which could only be done, as Dr. McDonald conceded, by "dismantl[ing] District 3 and chang[ing] its form quite dramatically"—thus violating core preservation and incumbency protection. JA 670-71.

As explained, the only analysis of VTD *swaps* demonstrated that they had a political effect identical to their racial effect. *See supra* pp. 9-10. Indeed, Dr. McDonald *agreed* with Mr. Morgan's showing of such a coextensive political effect. *See id.*; JA 643-49.

In any event, the relied-upon VTD analysis is even *less* defensible than the analysis this Court rejected as a matter of law in *Cromartie II*. *See* J.S. App. 34a. There, the Court concluded that the VTD analysis "offer[ed] little insight into the legislature's true

motive" and overturned as clearly erroneous the three-judge court's judgment that relied upon it. 532 U.S. at 248. First, the expert had not shown whether "the excluded white-reliably-Democratic precincts were located near enough to [the challenged district's] boundaries or each other for the legislature as a practical matter to have drawn District 12's boundaries to have included them, without sacrificing other important political goals." *Id.* Moreover, while all of the examined precincts "were at least *40%* reliably Democratic[,] . . . virtually all the African-American precincts included in [the district] were *more* than 40% reliably Democratic." *Id.* Because the legislature's objective was to make the district "as safe as possible" politically, it "sought precincts that were reliably Democratic, not precincts that were *40%* reliably Democratic, for obvious political reasons." *Id.*

Dr. McDonald's analysis suffers from both of these "major deficiencies." J.S. App. 75a. *First*, as in *Cromartie II*, the analysis includes VTDs not "located near enough" to District 3 to be included "as a practical matter." 532 U.S. at 247. Dr. McDonald examined VTDs in "*localities*" adjacent to Enacted District 3, which includes VTDs up to *thirty miles away* from District 3's boundary. J.S. App. 74a-75a; JA 670-71, 771.

Second, Dr. McDonald lumps together all 55% and above Democratic VTDs, even though many "African-American precincts" are far more Democratic than 55%—so he has not shown that "the excluded white precincts were as reliably Democratic as the African-American precincts that were included in" District 3. *Cromartie II*, 532 U.S. at 247. When this basic flaw

is corrected, the VTDs analyzed by Dr. McDonald reveal a *political* pattern no different from their *racial* pattern. Based on Dr. McDonald's own analysis and not Mr. Morgan's analysis the majority (falsely) contends is incorrect, "while the highly Democratic VTDs within [District 3] had a BVAP *16* percentage points greater, they also performed *15.5* percentage points better for Democrat[s]" than the "excluded" VTDs in adjacent localities. J.S. App. 75a-76a (emphasis added); JA 544-45. Similarly, the VTDs *added* to District 3 in 2012 also had a BVAP 12.8% higher, and a Democratic vote share 12.2% higher, than the "excluded" VTDs. JA 437-40, 544-45. Dr. McDonald thus has done nothing to undermine the conclusion that the Legislature, "by placing reliable Democratic precincts within a district without regard to race, end[ed] up with a district containing more heavily African-American precincts, but the reasons w[ere] political rather than racial." *Cromartie II*, 532 U.S. at 245-46.

Indeed, Dr. McDonald's VTD analysis cannot show a racial purpose to "*increase* the proportion of minorities" in District 3 because *Plaintiffs' own* Alternative Plan shows a similar pattern though its avowed purpose was to *decrease* District 3's BVAP. JA 687-88. Dr. McDonald's own data confirms that the 160 "highly Democratic" VTDs in Plaintiffs' Alternative District 3 are *13.5% more black* (and 11.8% more Democratic) than the 145 "highly Democratic" VTDs in localities adjacent to Alternative District 3. *See* JA 437-40, 544-45.

IV. DISTRICT 3 DOES NOT SUBORDINATE TRADITIONAL DISTRICTING PRINCIPLES

1. Even assuming race explains District 3's shape, there is no *Shaw* violation because District 3 does not subordinate neutral principles. Indeed, it is undisputed that the Enacted Plan best serves the traditional districting principles the Legislature prioritized and applied to all districts statewide. As noted, the Enacted Plan is the *only* plan produced at the time or in litigation that protects all 8 Republican and 3 Democratic incumbents. It also does the best job of core preservation. Dr. McDonald *conceded* that Plaintiffs' Alternative "undermines" the Legislature's incumbency-protection goals and performs "significant[ly]" *worse* on the core-preservation goal the Legislature prioritized over all other traditional principles. JA 889-90.

2. The majority avoided this conclusion only by focusing exclusively on *other* traditional principles the Legislature prioritized *lower* than core preservation and incumbency protection. *See* J.S. App. 24a-27a. But all of the majority's criticisms flowed from the Legislature's decision to preserve the cores of the Benchmark districts. Indeed, the locality splits, alleged lack of compactness, and use of water contiguity the majority relied upon, *see id.*, were all *inherited* from Benchmark District 3, which perpetuated the 1998 *Shaw* remedy, *see supra* pp. 3-12. In fact, the Enacted Plan *improved* upon the Benchmark Plan by, for example, reducing the number of locality splits from 19 to 14. JA 803. As Dr. McDonald conceded, the Enacted Plan "scored highly" on locality splits. JA 657. The only reason

the Alternative Plan contained one fewer locality split than the Enacted Plan was because it did "significantly" worse in preserving District 3's core. JA 889-90.

Thus, it was not *race* that subordinated the majority's principles, but *core preservation*. Of course, it was the province of the Legislature to "balance" its priorities against "competing" principles—and courts are not permitted to upset that balance in *Shaw* cases. *Miller*, 515 U.S. at 915; *Bush*, 517 U.S. at 977 (plurality op.) (enacted district need not "defeat rival districts designed by plaintiffs' experts in endless 'beauty contests'"). Here, preserving District 3's core made unusually good sense for the independent reasons that District 3 "conform[ed] to all requirements of law" when it was adopted as a *Shaw remedy*, *Moon*, 952 F. Supp. at 1151, had not been challenged under *Shaw* in the 2001 *Wilkins* case, and was politically beneficial to Republican incumbents, JA 643-49.

In contrast, avoiding locality splits has not been an important principle in Virginia for decades. The Virginia Constitution was amended in 1970 to *eliminate* respect for "political subdivisions." Int.-Def. Ex. 55 at 782. In 2000, the Legislature identified by statute certain important traditional principles; respecting localities was not included. Va. Code Ann. § 24.2-305. The Virginia Supreme Court, in a *Shaw* case, listed "preservation of existing districts" and "incumbency," but not respecting political boundaries, as traditional principles. *Wilkins*, 264 Va. at 464.

While ignoring these dispositive points, the majority bizarrely criticized the Enacted Plan for not *sufficiently* preserving District 3's core, because it moved more than the bare minimum number of people needed to achieve population equality in that District (when unrealistically viewed without regard to the population needs of *other* districts). J.S. App. 28a. But *more* core preservation would have *exacerbated* departure from the majority's principles and the stated policy was not to make only those changes required by population equality, but to preserve the cores of districts (with minor swaps to bolster incumbents politically). It is undisputed that District 3 fulfilled those criteria as well as its majority-white counterparts, since more of its core was preserved than two such districts and the additional swaps bolstered incumbents. JA 524, 643-49. In contrast, the Alternative Plan the majority praises preserves *less* of the core of District 3 than of *every majority-white* district, *see* JA 524, and moves more than *twice* as many people in and out of District 3 than the Enacted Plan, JA 270.

Similarly, the majority's concerns about District 3's compactness are wildly overblown. District 3's compactness is not materially different than other districts because it scores only *.01* less than the second-least compact (majority-white) district. J.S. App. 77a-79a. Dr. McDonald conceded that these differences "are relatively small" and "not significant under any professional standard." JA 725-26. He also admitted that compactness measures like those the majority invoked are "inherently manipulable" and that there is no "professional standard" for judging compactness. JA 726.

Further, the majority criticized Enacted District 3 for using "water contiguity," though it recognized that water contiguity is "legal[]." J.S. App. 26a. The majority also took issue with the Enacted Plan's VTD splits, *id.* 27a, notwithstanding Dr. McDonald's concession that avoiding VTD splits is not a traditional principle, JA 726-28. The majority nonetheless condemned the Legislature for availing itself of these permissible methods because they were purportedly used for racial reasons. J.S. App. 24a-30a. But *Shaw* does not condemn racially-influenced line-drawing that *comports* with traditional principles, only that which *subordinates* such principles. *Ala.*, 135 S. Ct. at 1270. Anyway, Alternative District 3 *also* uses water contiguity, JA 423, and has the *same number* of VTD splits affecting population as the Enacted Plan, *see* JA 806-07; J.S. App. 79a-81a.

V. THE MAJORITY MISAPPLIED THE NARROW TAILORING REQUIREMENT

Although irrelevant, the majority's strict scrutiny analysis is also legally erroneous. The majority found that "the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5," but adopted a narrow tailoring analysis irreconcilable with *Alabama*. J.S. App. 37a.

Narrow tailoring "insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." *Ala.*, 135 S. Ct. at 1274. Legislatures "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons*

to believe such use is required, even if a court does not find that the actions were necessary." *Id.* (emphasis original).

This deferential standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest" or that a legislature "guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Id.* at 1273-74. "The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few." *Id.*

Narrow tailoring thus accords legislatures significant discretion to choose from among a range of VRA-compliant redistricting options. *See id.* Most obviously, a legislature necessarily has a "good reason" to choose the Section 5-compliant plan that *least subordinates* neutral principles, and thus best complies with *Shaw*.

The Legislature clearly had "good reasons to believe" that the Enacted Plan was appropriate to comply with Section 5. *Id.* First, Delegate Janis *correctly* interpreted Section 5 as prohibiting "retrogress[ing] minority voting influence" in District 3. *Compare* J.S. App. 2a, 21a-23a, 55a-61a; JA 124, 350, 356, 362, 364, 368, 369, 449, *with Ala.*, 135 S. Ct. at 1274. Moreover, the year prior to adoption of the Enacted Plan, the Legislature adopted, with strong support from black legislators, a House of Delegates redistricting plan with 55% or higher BVAP in all

majority-black districts, including in geographic areas covered by District 3. JA 515-18. Because black legislators did not want to *harm* black voters, there were very good reasons to believe that this level of BVAP, far from "packing," was proper under Section 5. *See Georgia v. Ashcroft*, 539 U.S. 461, 484, 489-91 (2003) (finding "significant" the views of "representatives . . . protected by the Voting Rights Act").

Moreover, the Enacted Plan with 56.3% BVAP in District 3 performs *better* on the Legislature's incumbency-protection and core-preservation priorities than *any* alternative proposed at the time or in litigation. Indeed, even Plaintiffs' modest 3% BVAP reduction significantly damaged the Legislature's incumbency-protection and core-preservation priorities. JA 520-21, 522, 640-41, 668-70, 693, 697, 889-90; J.S. App. 88a-89a. The Enacted Plan's 3.2% BVAP increase, in contrast, optimally *reduced* conflict between race and neutral principles. *See Ala.*, 135 S. Ct. at 1270-74; *Bush*, 517 U.S. at 977.

Nonetheless, the majority again reasoned that the Enacted Plan was not narrowly tailored because it increased District 3's BVAP. J.S. App. 40a. But the notion that BVAP increases are not "narrowly tailored" because they are not the "least restrictive means" for Section 5 compliance is a legally incorrect test, as *Alabama* confirms, which is why the majority no longer *articulated* this test (but nonetheless continued to *apply* it) on remand. Mem. Op. 43 (DE 109); J.S. App. 39a-40a. *Alabama* obviously did not create a Benchmark BVAP *ceiling* while criticizing such a *floor*, but plainly authorized legislatures to choose a modest BVAP increase where, as here, it

better complies with neutral principles. *See* 135 S. Ct. at 1274. Using the Benchmark BVAP as a ceiling injects *more* race-consciousness by placing states in a racial straitjacket of precisely replicating or reducing BVAP—exactly the type of "trap for an unwary legislature" that *Alabama* forecloses. *Id.* This is particularly obvious here since *augmenting* District 3's BVAP could not have resulted from Delegate Janis's purported desire to avoid *reducing* the 53.1% BVAP, so was necessarily attributable to the incumbency-protection objective it directly furthered.

The majority also found no narrow tailoring because the Legislature did not conduct a costly voting analysis. J.S. App. 42a. But *Alabama* does not require such an analysis. *See* 135 S. Ct. at 1274. And any such analysis to support *reduction* of the BVAP would have been irrelevant here, because such reduction was *foreclosed* by the neutral objectives since it inherently endangered incumbents. This is particularly obvious because any such analysis would have "supported" a dramatic reduction to *less than 30%* BVAP (the non-retrogression percentage resulting from Plaintiffs' voting analysis). JA 702-08. This would have required massive redrawing of many districts' lines and could never be *proven* to be non-retrogressive to the Justice Department. Since any voting analysis was only relevant to supporting a BVAP reduction that both exacerbated the *Shaw* violation by subordinating neutral incumbency protection and at least seriously jeopardized Section 5 preclearance, the Legislature had excellent reasons to eschew this purposeless waste of resources.

VI. APPELLANTS HAVE STANDING TO APPEAL

As Defendants agree, *see* Reply Of Virginia Appellees To Supplemental Briefing On Standing (Oct. 20, 2015), Appellants have standing to appeal because the "judgment" causes them "direct, specific, and concrete injury" by requiring alterations to their districts that place at least one Appellant in a majority-Democratic district and, thus, harm his re-election chances and interests as a Republican voter. *ASARCO*, 490 U.S. at 623-24 (intervenor-defendants had standing to appeal absent State defendants' appeal); *see* Appellants' Br. Re. Standing; Appellants' Reply Br. Re. Standing (Oct. 20, 2015).

1. A party has standing to appeal when it has "a direct stake in the outcome of a litigation." *Diamond v. Charles*, 476 U.S. 54, 66 (1986); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). An intervenor-defendant possesses such a direct stake where the "judgment" causes it "direct, specific, and concrete injury," such as by creating "a serious and immediate threat" to its legal interest. *ASARCO*, 490 U.S. at 618, 623-24. The "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2 (2006).

Here, there is not merely a "serious and immediate *threat*" to Appellants' districts, but an "actual" change to at least one of them. Indeed, the judgment necessarily requires a remedy that harms at least one Appellant by shifting black (and overwhelmingly Democratic) voters out of District 3 and into one or more of the surrounding Republican districts, and an

equal number of non-black (and far less Democratic) voters into District 3. *All* of these adjacent districts are represented by Appellants. Thus, any remedy will necessarily alter at least one Republican district where an Appellant has previously been elected and voted. *See* Appellants' Br. Re. Standing 7-15; Appellants' Reply Br. Re. Standing 2-10. This is no mere threat, but a *certainty*. *Every* properly-filed proposed remedial plan made at least one Republican district majority-Democratic. *See* Appellants' Br. Re. Standing 9-10; Appellants' Reply Br. Re. Standing 4-5. Several of these plans harm Appellant Forbes by transforming majority-Republican District 4 into a majority-Democratic district, while others harm Appellant Rigell by turning the toss-up District 2 into a majority-Democratic district. *See* Appellants' Br. Re. Standing 9-10; Appellants' Reply Br. Re. Standing 4-5. The special master's proposals completely transform District 4 from a 48% Democratic district into a safe 60% Democratic district. *See* Rep. 45, 52.

Such changes will obviously impose a "direct, specific, and concrete injury" on every affected Appellant. *ASARCO*, 490 U.S. at 623-24. They will "harm" his or her "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474-75 (1987), replace a portion of the "base electorate" with unfavorable Democratic voters, *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 409 n.3 (7th Cir. 2005), and undo his or her recommendations for the district. These injuries and harms to Appellants' re-election chances are identical to or even more substantial than injuries this Court has upheld as sufficient to confer standing in the electoral context. *See, e.g.*, *Keene*, 481 U.S. at 474

("harm [to] chances for reelection"); *Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974) (candidates have "ample standing" to challenge ballot-access requirements); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (public officeholders had standing to challenge laws requiring automatic resignation upon announcing candidacy for another elective office); *FEC v. Akins*, 524 US. 11, 21 (1998) (deprivation of information regarding group's political activities); *Davis v. FEC*, 554 U.S. 724, 734-35 (2008) ("burden[] [on] expenditure of personal funds" in political campaign); *Swann v. Adams*, 385 U.S. 440, 443 (1967) (intervenors had standing to appeal in redistricting case even though they resided in a county they "concede[d] has received constitutional treatment under the legislative plan" because they sought a remedy providing their county "different treatment"); *see also* Appellants' Br. Re. Standing 11-13; Appellants' Reply Br. Re. Standing 5-8.

Indeed, the "direct, specific, and concrete" harm to Appellants' re-election chances, *ASARCO*, 490 U.S. at 623-24, affects Appellants far more tangibly and directly than lower-court judgments that the Court routinely finds confer standing; *i.e.*, "the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial" that only "contingent[ly]" affects the defendant. *Clinton v. City of New York*, 524 U.S. 417, 430 (1998); *see* Appellants' Br. Re. Standing 11-13; Appellants' Reply Br. Re. Standing 5-8. And it is well-established that actions which threaten one's current occupation or potential employment advancement constitute cognizable injury. *See, e.g.*, *Clements*, 457 U.S. at 962; *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764-66 (1976);

Martin v. Wilks, 490 U.S. 755 (1989). There is no reason to exclude members of Congress from this general rule.

2. Plaintiffs contend that Appellants lack standing because they do not allege a violation of "their constitutional or statutory legal rights." Supp. Br. of Appellees 14-15 (Oct. 13, 2015). But unlike plaintiffs, who must establish a violation of a legal *right* to have standing to challenge a *law*, defendants virtually *never* assert a violation of *rights* (except as a counterclaim) when they are sued. Rather, a *defendant* asserts a legally cognizable interest in an appeal where the judgment deprives it of the benefits of the law it is *defending*. *See* Appellants' Reply Br. Re. Standing 3-5. In *ASARCO*, for example, the suit had resulted in "an adjudication" that "pose[d] a serious and immediate threat to the continuing validity" of the intervenor-defendants' leases, which "would [be] remove[d]" if the Court found the challenged judgment "invalid." 490 U.S. at 618.

3. Precedent therefore establishes that Appellants have standing to appeal even though "none reside in or represent the only congressional district whose constitutionality is at issue." 11/13/15 Order; *see* Appellants' Br. Re. Standing 13-14; Appellants' Reply Br. Re. Standing 4-5. Moreover, the Court's decision in *Hays*, 515 U.S. 737, which did not involve any allegation of electoral injury but instead establishes the standing requirements for *Shaw* plaintiffs, *confirms* Appellants' standing to appeal here.

The Court held in *Hays* that "[a]ny citizen able to demonstrate that he or she, personally, has been

injured by [a] racial classification has standing to challenge the classification in federal court." *Id.* at 744. Thus, a plaintiff residing in the allegedly gerrymandered district has "standing to challenge the legislature's action." *Id.* at 745.

The only reason plaintiffs residing in adjacent districts did not automatically have standing to bring a racial discrimination claim is that they did not suffer "a *cognizable* injury *under the Fourteenth Amendment*" because that Amendment only grants a "*personal*" right to "equal treatment" and the voters had not "suffered such [race-based] treatment." *Id.* at 746-47 (emphasis added). Thus, *Hays* merely reaffirms the obvious proposition that those who have not been discriminated against have not suffered a Fourteenth Amendment injury, even if the "racial composition" of their district was affected by discrimination against *others*, just as non-minorities suffer no such injury when employment discrimination against minorities affects the composition of their workforce. *Id.* at 746. Significantly, *Hays* noted that creating the gerrymandered district "[o]f course" "*affects*" the "racial composition" of adjacent districts, but this did not violate the Fourteenth Amendment because any such effect was not motivated by a racial purpose. *Id.* (no evidence "that the [L]egislature intended [adjacent] District 5 to have any particular racial composition"). Here, in contrast, the negative effect on Appellants' re-election chances and electoral interests, even though not racially motivated, provides standing because it produces the requisite "direct stake in the outcome" of the appeal. Appellants' Br. Re. Standing 7-15.

Moreover, just as a plaintiff's constitutional rights are injured by residing in a racially gerrymandered district, so too are Appellants' cognizable interests injured by the majority's decision that works a "serious and immediate threat" to one or more of their districts and their electoral interests. *ASARCO*, 490 U.S. at 618. In both instances, the litigant is seeking relief against a legally improper action that will directly affect his district (an unconstitutional districting plan or an erroneous "remedial" alteration of a constitutional districting plan).

More to the point, an incumbent in an adjacent district is alleging injury no different than an incumbent residing in (and defending) the allegedly gerrymandered district, who concededly would have standing to appeal an adverse judgment. An adverse judgment imposes an identical harm on representatives residing adjacent to the gerrymandered district as it does on the incumbent in the district. Because congressional redistricting plans must achieve equal population across all districts, any remedial alteration of the population of the gerrymandered district will be precisely *equal* to the (cumulative) population alteration of the adjacent districts. For example, the special master's proposed plans move 321,782 or 336,752 people, respectively, into District 3 and the same number out of District 3. *See* Rep. 22, 25. Accordingly, just as District 3's incumbent would concededly have standing to appeal such threatened changes to his district, incumbents in neighboring districts have standing to appeal the corresponding changes to their districts.

Finally, Appellants *have* adduced "specific evidence" of personal harm—*i.e.*, their electoral harm—that *Hays* required of adjacent-district residents. 515 U.S. at 744-45.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT	1
SUMMARY OF ARGUMENT	4
I. APPELLANTS LACK STANDING	8
A. Only District-Specific Parties Have Standing to Advance or Defend District-Specific Claims	11
B. Appellants' Standing Theory Is Entirely Speculative	13
II. THE DISTRICT COURT PROPERLY FOUND THAT RACE PREDOMINATED IN CD3	20
A. Senate Criteria	21
B. Delegate Janis's Statements	22
C. BVAP Threshold	27
D. Traditional Districting Principles	30
1. CD3 Deviates from Traditional Districting Principles	31
2. Appellants' Attempts to Explain Away These Deviations Fail	32
E. Racial Sorting of VTDs	39
III. APPELLANTS' ARGUMENT THAT POLITICS PREDOMINATED IS BASELESS	4

TABLE OF CONTENTS—Continued

Page

A. The Record Does Not Support Appellants' Factual Assertion that Politics Drove CD3 42

B. Use of Race as a Proxy for Partisan Goals Only Further Establishes Racial Predominance 47

IV. *CROMARTIE II*'S DISCUSSION OF CIRCUM-STANTIAL EVIDENCE IS INAPPOSITE 49

V. THE DISTRICT COURT PROPERLY APPLIED STRICT SCRUTINY 53

CONCLUSION 57

TABLE OF AUTHORITIES

CASES Page(s)

Ala. Legis. Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) ..... *passim*

Ala. Legis. Black Caucus v. Alabama,
989 F. Supp. 2d 1227 (M.D. Ala. 2013) 47

Already, LLC v. Nike, Inc.,
133 S. Ct. 721 (2013) 9

Anderson v. City of Bessamer City,
470 U.S. 564 (1985) 40

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 9, 10, 14

Bethune-Hill v. Va. State Bd. of Elections,
No. 15-680 (docketed on November 23,
2015) 55

Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

Clapper v. Amnesty Intern. USA,
133 S. Ct. 1138 (2013) 14, 18

Clark v. Putnam Cty.,
293 F.3d 1261 (11th Cir. 2002) 34, 48

Clements v. Fashing,
457 U.S. 957 (1982) 19

Cromartie v. Hunt,
133 F. Supp. 2d 407 (E.D.N.C. 2000),
rev'd, 532 U.S. 234 (2001) 50, 51

Davis v. Fed. Election Comm'n,
554 U.S. 724 (2008) 14, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Diamond v. Charles,
476 U.S. 54 (1986)..... 9, 10

Didrickson v. U.S. Dep't of Interior,
982 F.2d 1332 (9th Cir. 1992)..... 10

Easley v. Cromartie,
532 U.S. 234 (2001).....*passim*

Fed. Election Comm'n v. Akins,
524 U.S. 11 (1998)..... 19

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976)..... 19

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013)..... 8, 9, 10, 14

Hunt v. Cromartie,
526 U.S. 541 (1999)..... 50, 52, 53

Johnson v. Mortham,
915 F. Supp. 1529 (N.D. Fla. 1995)..... 11, 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..... 9, 11, 14, 15

Martin v. Wilks,
490 U.S. 755 (1989)..... 19

Meese v. Keene,
481 U.S. 465 (1987)..... 18

Miller v. Johnson,
515 U.S. 900 (1995).....*passim*

Moon v. Meadows,
952 F. Supp. 1141 (E.D. Va.), *aff'd*, 521
U.S. 1113 (1997).....*passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Perry v. Village of Arlington Heights,
186 F.3d 826 (7th Cir. 1999) 14

Raines v. Byrd,
521 U.S. 811 (1997) 8

Shaw v.Reno,
509 U.S. 630 (1993) 31, 35, 49

Shaw v. Hunt,
517 U.S. 899 (1996) ..... *passim*

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 9

Smith v. Beasley,
946 F. Supp. 1174 (D.S.C. 1996) 25

Storer v. Brown,
415 U.S. 724 (1974) 19

United States v. Hays,
515 U.S. 737 (1995) 11, 13

Whitmore v. Arkansas,
495 U.S. 149 (1990) 9

CONSTITUTION

U.S. Const. art. III ..... *passim*

U.S. Const. amend. XIV, § 1 2

Va. Const. art. II, § 6 35

STATUTES

Voting Rights Act of 1965, § 5, 42 U.S.C.
1973c ..... *passim*

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page(s)

Gary C. Jacobson, *The Electoral Origins of Divided Government: Competition in U.S. House Elections, 1946-1988* (1990) 40

Rachel Weiner, *Rep. Scott Rigell retiring in 2017*, Wash. Post, Jan. 14, 2016, https://www.washingtonpost.com/local/virginia-politics/rep-scott-rigell-of-virginia-says-he-wont-run-for-reelection/2016/01/14/252e3960-baf8-11e5-99f3-184bc379b12d_story.html 15

STATEMENT

Virginia's Third Congressional District ("CD3") is no stranger to this Court. The District Court has twice held that CD3 is an unconstitutional racial gerrymander, and Appellants have twice appealed that ruling here. Both times they have done so alone, without the support of the State Defendants who defended CD3 below. In light of the State Defendants' abandonment of the appeal, this Court lacks jurisdiction. And in light of the overwhelming evidence in support of the District Court's decision, this appeal lacks merit.

* * *

CD3's racial purpose manifests in its appearance. It is a bizarrely shaped district that starts north of Richmond and slides down the northern shore of the James River, ending abruptly at the James City border. It jumps over James City and lands in a horseshoe shape in Newport News. It leaps over southern and eastern Newport News and stops in Hampton. CD3 then starts anew on the river's southern shore, darting west to swallow Petersburg and then sliding east through Surry. It bypasses the Isle of Wright, covers Portsmouth, and runs up into Norfolk, tearing CD2 in two on either side of Norfolk. Joint Appendix ("JA") 413-17. As currently constituted, CD3 closely resembles the 1991 district deemed an unconstitutional racial gerrymander in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997). In a description that applies today, that court described CD3's predecessor as "a grasping claw." 952 F. Supp. at 1147. Then, as now, "[e]very one of the [district's] fingers which reaches . . . into the divided cities, uses . . . barren stretches of river, or other dubious connectors . . . in an effort to reach

theblack populations which it excises from the various cities." *Id.*; JA 413-17.

The Plan's architect Delegate Bill Janis candidly admitted his motives in drawing CD3. He repeatedly and unequivocally stated that achieving a numerical racial target in CD3 in attempted compliance with Section 5 of the Voting Rights Act ("VRA") was his "primary focus," of "paramount concern[]," and considered "nonnegotiable." JA 357, 370. Delegate Janis categorically denied that the peculiarities of CD3 resulted from a partisan purpose, stating without qualification: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." JA 456.

But Delegate Janis's race-based redistricting had no grounding in either the VRA or the history of CD3. Since 1991, CD3 has been represented by Congressman Bobby Scott, who has consistently won reelection by comfortable margins. Nevertheless, in the 2012 redistricting, the General Assembly increased the black voting age population (BVAP) in CD3 to satisfy a 55% BVAP threshold, creating a district in which Congressman Scott won his last election with **81.3%** of the vote. Jurisdictional Statement Appendix ("J.S. App.") 40a. The record showed that the General Assembly achieved its target racial composition by moving high-density BVAP areas into CD3, while excluding lower-density BVAP areas. *See* JA 206-15.

In October 2013, three Virginia voters residing in CD3 filed this action challenging CD3 as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶ 1. Appellants, current and former Republican Congressional representatives, intervened as Defendants. The

case went to trial in May 2014. The State Defendants[1] and Appellants presented a single witness in defense of the Plan—Appellants' expert, John Morgan. On October 7, 2014, the District Court ruled that CD3 was an unconstitutional racial gerrymander. Appellants appealed. The State Defendants did not.

This Court made no substantive rulings with respect to Appellants' first appeal. Rather, after deciding *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), the Court remanded this case for further consideration.

Upon remand, the District Court reaffirmed its prior decision, explaining why *Alabama* further bolstered its conclusion that CD3 was an unconstitutional racial gerrymander. J.S. App. 12a-13a, 39a-40a. Again, Appellants appealed. Again, the State Defendants did not.

While this appeal was pending, remedial proceedings below continued. The District Court appointed a special master, who considered draft plans submitted by parties and non-parties. On November 16, 2016, he issued a final report proposing two remedial plans and urging rejection of Appellants' proposed plans because they perpetuated, rather than remedied, the racial gerrymander of CD3. *See* Application for Stay of Remedial Plan (Jan. 12, 2016), Appendix C. On January 7, 2016, the District Court adopted one of the special master's proposals. *Id.*, Appendix B ("Remedy Order").

Five days later, Appellants filed an application to stay the remedial plan, which, as of the filing of this

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[1] Defendants are the Chair, Vice-Chair, and Secretary of the State Board of Elections, sued in their official capacity.

brief, remains pending. Both Appellees and the State Defendants opposed the application.

SUMMARY OF ARGUMENT

Appellants lack standing to pursue this appeal. They have no legal responsibility for drawing or enforcing the 2012 redistricting plan, nor do they live in or represent CD3, the only district whose constitutionality is at issue. Instead, their only claim to standing is that a remedial plan following from the District Court's judgment *might* negatively impact the chances of *some* Appellants *if* they choose to run for reelection in their current districts and *if* they are successful in defeating primary challengers. But the Court has never recognized a legally cognizable interest in an incumbent congressman's desire to maintain the precise partisan vote share that got him elected. Indeed, the remedial plan flowing from the District Court's judgment is merely one of a host of electoral circumstances that will decide Appellants' fate at the ballot box.

Even if the Court did have jurisdiction, there is no basis in law or fact to disturb the District Court's decision. The direct evidence of racial predominance is overwhelming. The General Assembly's official redistricting criteria listed VRA compliance as the most important factor other than population equality. JA 97. Significantly, as in *Alabama*, the *means* chosen by the General Assembly to comply with its overriding goal was a "mechanical racial target[]." 135 S. Ct. at 1267.

The plan's sole mapdrawer repeatedly confirmed that racial considerations predominated in drawing CD3. Delegate Janis mistakenly believed that the non-retrogression mandate prohibited *any* decrease in

BVAP percentages below the benchmark level, *see* JA 357, and he adopted a 55% BVAP threshold in CD3 to ensure preclearance under Section 5, *see* JA 398. He drew CD3 with this "mechanically numerical" understanding of Section 5, *Alabama*, 135 S. Ct. at 1272

The circumstantial evidence confirms Delegate Janis's express admissions that race predominated. CD3 is the least compact district in the Commonwealth, tenuously uses water contiguity to string together disparate black communities along the James River, and, as a result, splits more localities than any other district. To achieve its racial goals, the General Assembly moved over 180,000 people between CD3 and adjoining districts to achieve an overall population increase of only 63,976 people, disproportionately moving black voters into and white voters out of CD3.

Appellants can hardly dispute this evidence, let alone establish that the District Court's factual findings were "clearly erroneous." *Miller v. Johnson*, 515 U.S. 900, 917 (1995). They attempt to conjure a legal error out of their disagreement with the District Court's factual findings, arguing that the court "failed to apply" *Alabama*. Appellants' Br. 25. This not only mischaracterizes the District Court's decision, it ignores the dissent below, which had no quarrel with the majority's legal analysis, only its resolution of factual disputes. *See* J.S. App. 45a (agreeing that the majority "applied the proper analytic framework as specified by *Alabama*").

Appellants' constant refrain on appeal is that politics, and not race, drove CD3. To believe Appellants' revisionist history, however, this Court would have to find that Delegate Janis was lying when

he announced that racial goals were his paramount concern, that all other factors took a backseat to achieving a precise racial composition in CD3, and that he did not consider the political performance of the districts. According to Appellants, politicians prioritize politics no matter what they say to the contrary. This view not only contradicts the legislative record in this case, it invites legislatures to say one thing and do another to avoid judicial scrutiny.

Indeed, Appellants unabashedly contend that Delegate Janis's use of a numerical racial target is irrelevant to the predominance inquiry where, in so doing, he achieved his purported partisan goals. But far from disproving the District Court's findings, Appellants' suggestion that the General Assembly used race as proxy for political objectives only *confirms* that race predominated. Appellants' Machiavellian approach to the use of race for political ends openly flouts this Court's precedent. *See Bush v. Vera*, 517 U.S. 952, 968 (1996).

Ultimately, Appellants' argument rests on a single case: *Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*"). Appellants insist that, under *Cromartie II*, Appellees could not advance a *Shaw* claim without an alternative plan that achieves the precise partisan objectives Appellants project onto Delegate Janis. But *Cromartie II* hardly rewrites the threshold showing of racial predominance for all racial gerrymandering plaintiffs. In that case, the direct evidence evinced an avowedly partisan purpose behind the plan and plaintiffs advanced a largely circumstantial case to prove otherwise. In this case, the direct evidence reveals an avowedly *racial purpose* behind CD3, which is bolstered by circumstantial evidence of the district's shape and demographics.

Contrary to Appellants' view, there remains more than one way to demonstrate that race predominated over political considerations, including when the sole mapdrawer publicly declares that race predominated over political considerations.

Appellants' argument that the District Court misapplied the narrow tailoring requirement is equally flawed. Appellants cannot explain away the General Assembly's failure to engage in any analysis whatsoever to determine whether the VRA compelled its race-based approach. The General Assembly made the same mistake as did the legislature in *Alabama*. It "asked the wrong question" by focusing on how it could it draw CD3 to comply with an arbitrary racial threshold. *Alabama*, 135 S. Ct. at 1274. It failed to ask the *right* question: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.*

In the end, it seems that even Appellants recognize their argument on racial predominance is all but doomed by *Alabama*, which is why they studiously avoid their own arguments and evidence below. Based on their flawed understanding of the law at the outset of this case, Appellants conceded that "compliance with Section 5 was [the legislature's] predominant purpose or compelling interest underlying District 3's racial composition." J.S. App. 19a. They now disavow those words as "*post hoc* litigation statements [made] by strangers to the redistricting process." Appellants' Br. 46 n.4. Appellants affirmatively offered testimony below supporting and extolling the General Assembly's use of a 55% BVAP threshold. Dkt. No. 85 (Int.-Def. Tr. Br. 25-26). They now contend there was no such thing. *Id.* at 44.

Appellants' ever-evolving view of the factual record is telling. The record, in any event, speaks for itself—and the General Assembly's predominant and unjustified use of race in drawing CD3 is resoundingly clear.

I. APPELLANTS LACK STANDING

The Court lacks jurisdiction to hear this appeal because Appellants lack standing to pursue it. None of the Appellants resides in CD3, represents CD3, or is responsible for drawing or conducting elections in CD3. Rather, their claim to standing rests entirely on speculative electoral prospects in surrounding districts. The Court should reject Appellants' invitation to expand the scope of Article III by opening its doors to political candidates seeking to attain just the right number of just the "right" kind of voters to secure electoral victory.

Article III of the Constitution limits the jurisdiction of federal courts to matters that present "cases" or "controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). This "essential limit" to the federal judiciary's power requires more than "the party invoking the power of the court hav[ing] a keen interest in the issue." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). Rather, all litigants must be able to demonstrate (1) they have suffered "a concrete and particularized injury," (2) that "is fairly traceable to the challenged conduct," and (3) "is likely to be redressed by a favorable judicial decision." *Id.* at 2661 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also id.* ("The presence of a disagreement, however sharp and acrimonious . . . , is insufficient by itself to meet Art. III's requirements.") (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

A litigant cannot satisfy Article III by positing a theoretical harm that might conceivably follow from adjudication of a matter. It must show an "injury in fact," by which is meant "an invasion of *a legally protected interest*" that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (emphasis added). Moreover, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action . . . and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Article III's case and controversy requirements apply to both plaintiffs and defendants and "persist throughout all stages of litigation." *Hollingsworth*, 133 S. Ct. at 2661 (citing *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("Standing to sue or *defend* is an aspect of the case-or-controversy requirement.") (emphasis added).

An intervenor need not necessarily establish independent Article III standing if there is another party with standing on the same side of the case.[2] But if the party with standing chooses not to appeal, there is no longer any case or controversy. *See Diamond*, 476 U.S. at 63-64 ("By not appealing the judgment below, the State indicated its acceptance of that decision . . . .

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[2] The U.S. Courts of Appeal are divided as to whether intervenors must independently establish Article III standing to participate in district court proceedings, and the Court has thus far declined to reach that question. *See Diamond*, 476 U.S. at 68-69 & n.21 (1986). That question is not presented by this appeal.

The State's failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State[.]"). Thus, where, as here, an intervenor appeals alone, it must demonstrate that it has standing. *Hollingsworth*, 133 S. Ct. at 2659; *Arizonans*, 520 U.S. at 65 (an intervening party "cannot step into the shoes of the original party" unless the intervening party independently "fulfills the requirements of Article III"); *see also Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) ("An interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties.").

Appellants cannot demonstrate that here. None of the Appellants have legal authority for redistricting or the conduct of Virginia elections—those jobs belong to the General Assembly (which has not intervened) and the Board of Elections (which has moved this Court to *affirm* the decision below). Thus, the District Court's decision has not caused Appellants any "direct injury," because it "ha[s] not ordered [Appellants] to do or refrain from doing anything." *Hollingsworth*, 133 S. Ct. at 2662.

Appellants instead contend that they collectively have standing because implementation of the District Court's liability judgment will—by curing the unconstitutional racial gerrymander of CD3—require "alterations to their districts that place at least one Appellant in a majority-Democratic district and, thus, harm his re-election chances and interests as a Republican voter." Appellants' Br. 57 As explained below, this theory of injury is neither "concrete" nor "trace[able]" to the District Court's judgment, *Lujan*, 504 U.S. at 560, as Appellants' electoral prospects

remain contingent upon a host of ever-shifting circumstances.

A. Only District-Specific Parties Have Standing to Advance or Defend District-Specific Claims

In a racial gerrymandering case, standing requires a "district-specific" and "personal" injury. *Alabama*, 135 S. Ct. at 1265. While the harms that flow from a racial gerrymander "directly threaten a voter who lives in the *district* attacked, . . . they do not so keenly threaten a voter who lives elsewhere in the State," and therefore "the latter voter normally lacks standing to pursue a racial gerrymandering claim." *Id.*; *see also United States v. Hays*, 515 U.S. 737, 739 (1995) (voters who "do not live in the district that is the primary focus" in a racial gerrymandering case lack standing). There is no defensible basis for a rule that provides that, while voters *challenging* a racial gerrymander must live in the district being challenged, politicians *defending* a racial gerrymander may live anywhere in the Commonwealth.

The district court in *Johnson v. Mortham*, 915 F. Supp. 1529, 1537-38 (N.D. Fla. 1995), recognized as much, holding that congressional representatives residing outside the challenged district had no standing to intervene to defend a racial gerrymandering challenge because—just like a voter who resides in another district—they have "no more than a generalized interest in [the] litigation, since . . . the possibility of a remedy that would impair their interests in their congressional seat is no more than speculative." The *Johnson* court specifically considered the argument that redrawing the challenged district would likely affect surrounding districts but

"[n]evertheless" held that proposed intervenors did not have standing. *Id.* at 1538.

Appellants cannot draw any meaningful distinction between the voter who lives outside CD3 and the Congressperson who represents another district. Both may be affected by, but are bystanders to, the race-based redistricting of CD3. Indeed, it would be a perversion of this Court's racial gerrymandering jurisprudence to hold that while voters lack standing to challenge the *packing* of black voters in an adjacent district, their representative has standing to challenge the *dispersion* of black voters from that same adjacent district, *see* Appellants' Br. 57 (protesting the "shift[ing] [of] black . . . voters" into one or more of Appellants' districts). Simply put, Appellants are wrong to suggest that the standing restraints that apply to ordinary voters in racial gerrymandering claims do not apply to members of Congress.[3]

Their suggestion that "Republican voters" are exempt from this requirement is all the more galling. This assertion is indistinguishable from an argument that any voter in the Commonwealth has standing to challenge or defend CD3 as a racial gerrymander. Republican and Democratic voters alike may assert an interest in maintaining the partisan balance of their districts in the face of potential changes to a district elsewhere in the Commonwealth. But this is precisely

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[3] As discussed below, Appellants have not articulated a legally cognizable interest on behalf of *any* Congressional representatives to a particular district configuration or demographic composition. But because none of the Appellants reside in CD3, the Court need not decide whether an incumbent who did reside in the allegedly gerrymandered district would have standing to defend it.

the type of "generalized grievance against allegedly illegal governmental conduct" that the Court has found insufficient to meet Article III's standing requirements. *Hays*, 515 U.S. at 743; *see also id.* at 744 ("We . . . reject appellees' position that 'anybody in the State has a claim[.]'").

In short, non-resident Appellants cannot establish that their interest in *preserving* the racial gerrymander of CD3 is any more legally cognizable than that of non-resident voters in *undoing* the racial gerrymander of CD3.

B. Appellants' Standing Theory Is Entirely Speculative

Even if the Court were to find that incumbent Members of Congress are exempt from the established standing rules governing racial gerrymandering claims, Appellants' specific claim to a legally cognizable injury remains both attenuated and unsupported. According to Appellants, the District Court's judgment "harms" at least one Appellant by "shifting black (and overwhelmingly Democratic) voters out of District 3 and into one or more of the surrounding Republican districts, and an equal number of non-black (and far less Democratic) voters into District 3." Appellants' Br. 57-58. Not surprisingly, Appellants fail to cite any cases suggesting that a politician's fear that voters of a certain race or political party may be moved into his district is a legally cognizable injury.

As an initial matter, the remedial plan adopted by the District Court after Appellants filed their merits brief does not retroactively confer standing. Standing must exist "at all stages of review," *Arizonans*, 520 U.S. at 67, including when a litigant first seeks an

audience in federal court, *see, e.g.*, *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1157 (2013) ("[W]e assess standing as of the time a suit is filed[.]"); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed."). Focusing on that snapshot in time enforces Article III's requirement that federal courts only review cases pursued by litigants who are likely to suffer concrete, particular, and imminent harm. Thus, "[i]t cannot be that, by . . . participating in the suit, [parties] . . . retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset." *Lujan*, 504 U.S. at 569 n.4; *see also Perry v. Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) ("It is not enough for [a litigant] to attempt to satisfy the requirements of standing as the case progresses.").

Standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts for the first time." *Hollingsworth*, 133 S. Ct. at 2661. Thus, Appellants must establish standing as of the moment they pursued this case, i.e., either when they first intervened or, at the latest, when they filed their initial notice of appeal. At either point, the question of whose district might be affected by an adverse judgment and how was far from concrete or imminent.[4]

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[4] To the extent Appellants try to bootstrap off of the remedial plan, it is notable that nine out of ten Appellants lack standing even under their own "electoral harm" theory, Appellants' Br. 63. Cantor and Wolf are *former* congressmen who do not reside in CD3. The remedial plan makes no changes to the boundaries of CD5 (Hurt), CD6 (Goodlatte), CD9 (Griffith), or CD10 (Comstock) and Appellants assert no meaningful changes to the partisan

In any event, Appellants fail to establish that they have a *"legally protected* interest" (whether as representatives of districts other than CD3, or as "Republican voters") in avoiding diminution of electoral prospects that establishes standing. *Lujan*, 504 U.S. at 560 (emphasis added). Taken to its logical (and untenable) conclusion, Appellants' argument would confer upon members of Congress, former members of Congress, and voters in general *a legally cognizable interest* in maintaining the *precise* partisan composition of the voters in the districts that they represent or live in.

This Court has never recognized a legal right following from such a broad and diffuse injury, and for good reason. Under this theory, a Congressman would have standing to challenge or defend virtually any law that caused even a miniscule number of voters who have previously supported him to move *from* his district—or, alternatively, caused voters from the other party to move *into* his district—on the theory that it reduced his partisan vote share and was "likely" to cause him injury by threatening his seat (or, in the case of a "Republican voter," his partisan interest in a Republican holding that seat). Thus, one could imagine a member of a party that enjoys disproportionate support among university communities filing suit to challenge the reduction of funding to a university in her district on the ground that the likely

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composition of CD1 (Wittman) and CD7 (Brat), *see generally* Application for Stay of Remedial Plan. Rigell, who represents CD2, also faces no injury, as he is not running for reelection. *See* Rachel Weiner, *Rep. Scott Rigell retiring in 2017*, Wash. Post, Jan. 14, 2016, https://www.washingtonpost.com/local/virginia-politics/rep-scott-rigell-of-virginia-says-he-wont-run-for-reelection/2016/01/14/252e3960-baf8-11e5-99f3-184bc379b12d_story.html.

result would be that her partisan vote share in the district would be reduced. But this is the very definition of an attenuated harm, which in any other context would plainly not be "fairly traceable" to the conduct at issue to support standing.

And the harm that Appellants assert is even further afield—they are not the members who represent the district in which the university is housed, they are the members who represent the *surrounding* districts, and who would claim standing based on their fear that cutting the university's funding will displace voters that have supported their *opponents* into surrounding districts. That such a result would be indisputably absurd exposes the fatal flaws in Appellants' position.

If Appellants are not claiming a legally cognizable interest in maintaining precisely the same partisan balance in the districts that they represent, then their standing must be based on an assumption that only changes resulting in a "majority-Democratic district" are likely to actually harm their chances for reelection. Appellants' Br. 57. But this alleged harm is also fundamentally flawed.

As a preliminary matter, it assumes that maintaining a majority partisan voter share in a district that one represents or lives in is a legally cognizable injury—and Appellants have been conspicuously unable to identify a single case so holding. Moreover, this theory of standing would be impossible for courts to apply in practice. Faced with intervention at the outset of a case, the district court would need to attempt to determine how drastic the alleged racial gerrymander may be found on the merits, how that gerrymander would likely be remedied, and whether that theoretical remedy would theoretically result in changing the majority partisan

voter share of one or more other districts. This is utterly unworkable.

More importantly, it assumes that the Appellants who are current members of Congress are not likely to lose an election if their districts remain as is. Appellant Cantor's own experience (losing a primary election to Appellant Brat in 2014) illustrates that this is not the case: politicians lose elections all of the time for all kinds of reasons.

Even assuming that such an injury is theoretically cognizable, it cannot support standing here because it is so highly speculative. Several things must happen before the asserted "injury" (an Appellant losing reelection because of the remedial plan) could come to pass: First, an Appellant has to win a primary election. Then, the Appellant has to lose in the general election to a Democrat *and* be able to demonstrate that the loss was due, not to the independent, ever-shifting nature of the electorate, or even to scandals or other failings of the Appellant's own making, but to the District Court's adoption of a map that tipped the election by swapping a dispositive number of Democrats for Republicans in the Appellant's district. Appellants are highly unlikely to *ever* be able to make that showing and certainly have not done so on the record here.[5]

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[5] Indeed, the speculative nature of Appellants' theory is now on full display. In their original briefing on standing, Appellants asserted that "[a]ll eight Appellants currently serving in Congress intend to seek reelection in 2016," Appellants' Br. Re: Standing (Oct. 13, 2015) 4. But thereafter, Rigell decided *not* to run for re-election. The "injury" he claimed in invoking this Court's jurisdiction will never come to pass. Politicians constantly adapt to changing political circumstances to best secure their chance at victory, for instance, by running for reelection in a different district, as Appellant Forbes is considering. *See, e.g.*,

Thus, even if Appellants' worst fears were to come true, and one or more Appellant lost reelection, an argument that the loss resulted from changes made to remediate a racial gerrymander in CD3 would be tenuous at best. *See Clapper*, 133 S. Ct. at 1150 (refusing to "endorse standing theories that rest on speculation about the decisions of independent actors").

Appellants' reliance on *Meese v. Keene*, 481 U.S. 465 (1987), moreover, does not support their claim to standing based on a potential harm to one's reelection prospects. *Meese* was a First Amendment case, and the reputational injury that the Court found supported the appellee's standing was of a sort long recognized as legally cognizable. *See id.* at 475-76. Nowhere does *Meese* hold that appellee's assertion that he faced injury to his reelection chances, which was part and parcel of the claimed reputational harm, constituted an independent and sufficient basis for standing. *Id.* at 476 ("[E]njoining the application of the words 'political propaganda' to the films would . . . redress the [asserted] *reputational* injury.") (emphasis added).

Appellants cite a laundry list of cases to assert that their alleged injury is "identical to or even more substantial than" other injuries that have conferred standing in the electoral context. Appellants' Br. 58-59. But in each of these cases, unlike here, the litigant had a direct stake in the outcome of the case.[6] That

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Respondents' Opposition to Stay Application (Jan. 21, 2016) 28-29. The fluidity of any one incumbent's electoral ambitions and prospects exemplifies the speculative nature of Appellants' standing theory.

[6] *See Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008) (self-financed candidate had standing to challenge campaign finance requirement where a ruling of unconstitutionality would have

candidates have standing in different electoral contexts is of no moment here.[7]

In sum, Article III's case and controversy requirement guards against precisely what Appellants are attempting to do here—hijack litigation that the Defendants no longer wish to defend and obtain this Court's review based entirely on harms that may never come to pass.

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prevented the FEC from requiring additional disclosures and bringing enforcement action against him for prior violations); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998) (respondent voters had standing under Federal Election Campaign Act to challenge FEC's dismissal of administrative complaint because statute specifically provided for redressability and their injury was of the kind that the statute was designed to address); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (officeholder appellees had standing to challenge resign-to-run provision because provision was a "but-for" cause of their decision not to run for affected office rather than a "speculative or hypothetical" obstacle); *Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974) (candidates had standing to challenge validity of ballot access signature requirements, because without signatures candidates could not appear on ballot).

[7] Appellants further argue that actions threatening one's current occupation constitute direct injury, but the case they cite contemplates an actual loss of current employment rather than ambiguous changes to the industry as a whole. *See Clements*, 457 U.S. at 962 (challenged provision required automatic resignation from current position if officeholders declared candidacy for another elected position). Their other two cited cases, moreover, pertain only to the specific context of Title VII violations. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-66 (1976); *Martin v. Wilks*, 490 U.S. 755 (1989). Indeed, this Court has rejected the notion that anyone asserting a "professional interest" in the outcome of a case would have standing. *Lujan*, 504 U.S. at 565.

II. THE DISTRICT COURT PROPERLY FOUND THAT RACE PREDOMINATED IN CD3

Appellants fare no better on the merits. Their persistent efforts to rewrite the factual record only reinforce that this appeal is premised on "post-hoc political justifications for the 2012 Plan," J.S. App. 33a, advanced by self-described "strangers to the redistricting process," Appellants' Br. 46 n.4.

Appellants' entire argument flows from their fundamental disagreement with the District Court's factual finding that race predominated in drawing CD3. Appellants repeatedly insist that politics, and not race, was the driving force behind CD3. Toward that end, Appellants contend that Delegate Janis—the chief mapdrawer—did not mean what he said when he announced that the racial composition of CD3 was his "paramount concern" and disavowed any consideration of partisan performance, *id.* at 38, 43, that Appellees' expert was not credible, *id.* at 46, and that the 55% BVAP threshold did not exist, *id.* at 44.

But the Court reviews these findings "only for 'clear error,'" *Cromartie II*, 532 U.S. at 242; *see also Miller*, 515 U.S. at 917. Thus, even if the Court "would have decided the case differently," it may reverse the District Court's finding on racial predominance only if "on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." *Cromartie II*, 532 U.S. at 242 (citations omitted). Here, the finding that race predominated is not only supported by the record—it is compelled by it.

A. Senate Criteria

Before embarking on the redistricting process, the Senate Committee on Privileges and Elections adopted official redistricting criteria ("Senate Criteria"), touted below by Appellants as "a preexisting framework against which to judge the Enacted Plan." Dkt. No. 85 (Int.-Def. Tr. Br. 18). The second criterion after "Population Equality" is avowedly racial. Titled "Voting Rights Act," it requires that "[d]istricts shall be drawn" to avoid "the unwarranted retrogression or dilution of racial or ethnic minority voting strength." JA 97. It was further decreed that this factor "shall be given priority in the event of conflict among the criteria." JA 99.

The predominance inquiry asks whether "the legislature 'placed' race 'above traditional districting considerations.'" *Alabama*, 135 S. Ct. at 1271 (citation omitted). That is precisely what the Senate Criteria do. Indeed, these criteria are virtually indistinguishable from the redistricting guidelines adopted in *Alabama*, which also listed "compliance with . . . the Voting Rights Act" as the second most-important criterion after population equality. *Id.* at 1263.

Appellants make little mention of this document, viewing the primacy of VRA compliance as a "truism" that stems from the Supremacy Clause. *See* Appellants' Br. 16. But, as in *Alabama*, the General Assembly's prioritization of VRA compliance is illuminating because of the *means* the General Assembly used to apply this overriding criterion. *See Alabama*, 135 S. Ct. at 1263 ("Specifically, Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage in existing majority-minority

districts."). Here, as found by the District Court and discussed below, the General Assembly attempted to achieve non-retrogression under Section 5 by using a "mechanical racial target[]." *Id.* at 1267. And, as in *Alabama*, the General Assembly's "express[] adopt[ion] and appli[cation] [of] a policy of prioritizing" this target "above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of" CD3. *Id.*

B. Delegate Janis's Statements

The repeated statements of the Plan's sole author regarding his methodology for drawing district lines leave little doubt that CD3 was driven, first and foremost, by race.[8] In his opening pronouncement about the Plan on the House floor, Delegate Janis confirmed that he applied the redistricting criteria as rank-ordered in the Senate Criteria, explaining that the two most important criteria he employed were adhering to the "one-person-one-vote rule" and ensuring that "there be no retrogression in minority voter influence" in CD3. JA 351.

And there is more. Delegate Janis went on to declare that "one [of] the *paramount concerns* in . . . drafting . . . was the constitutional and federal law mandate under the [VRA] that we not retrogress minority voting influence in [CD3]." JA 357 (emphasis added). He emphasized that he "was *most especially focused* on making sure that [CD3] did not retrogress

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[8] Appellants do not dispute that Delegate Janis was the Plan's sole author and the most knowledgeable about its purpose. The record makes these facts clear. *See, e.g.*, JA 361, 430. Accordingly, Delegate Janis's explanation of its purpose provides uniquely persuasive evidence that race predominated in drawing CD3.

in its minority voting influence," JA 361 (emphasis added); that "the *primary focus* of how the lines . . . were drawn was to ensure that there be no retrogression [of black voters] in [CD3]," JA 370 (emphasis added); and that he considered this factor "nonnegotiable," *id.*

And there is still more. Delegate Janis explained *how* he achieved this "paramount" criterion of non-retrogression. He simply "looked at the census data" to determine the BVAP of the existing CD3 and "ensure[d] that the new lines . . . would not retrogress in the sense that they would not have less percentage of [BVAP] under the proposed lines . . . than exist under the current lines." JA 357; *see also* JA 362 ("[T]he lines were drawn based on the Census Bureau data, which provides what the [BVAP] under the current district boundaries would be[.]"); JA 119-20 ("So mindful that the voting rights act requires us not to retrogress that district, . . . we can have no less than [the BVAP] percentages that we have under the existing lines[.]"). Delegate Janis further expressed his belief that ratcheting up the BVAP above 55% would provide "certainty" of DOJ preclearance. JA 398. In sum, Delegate Janis repeatedly stated that his goal was to achieve a certain racial composition for CD3 and that he ensured that result by looking solely at racial data.

These are precisely the kinds of statements that the Court concluded in *Alabama* were "strong, perhaps overwhelming, evidence that race did predominate." *Alabama*, 135 S. Ct. at 1271 (describing how "[t]he legislators in charge of creating the redistricting plan believed . . . that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible").

In *Shaw v. Hunt* (*Shaw II*), the Court "fail[ed] to see how the District Court could have reached any conclusion other than that race was the predominant factor" based largely on strikingly similar statements. 517 U.S. 899, 906 (1996) (quoting *Miller*, 515 U.S. at 918). North Carolina's Section 5 submission stated that the plan's "*overriding purpose* was to comply with the dictates of the Attorney General[] and to create two congressional districts with effective black voting majorities." *Id.* "This admission was confirmed by the plan's principal draftsman, who testified that creating two majority-black districts was the 'principal reason' for Districts 1 and 12." *Id.* That the plan was driven by the perceived need to comply with the VRA did not mitigate the Court's conclusion that race was the predominant factor. *Id.* at 904-05 (laws classifying citizens primarily on the basis of race are constitutionally suspect, "whether or not the reason for the racial classification is benign [or] the purpose [is] remedial"); *Miller*, 515 U.S. at 918 (race was predominant purpose where "the General Assembly was driven by its overriding desire to comply with [DOJ's] maximization demands").

In *Bush*, the Court relied on similar "substantial direct evidence of the legislature's racial motivations." 517 U.S. at 960. First, Texas's Section 5 submission stated that certain congressional districts "'should be configured in such a way as to allow minorities to elect Congressional representatives.'" *Id.* (citation omitted). Second, the litigants conceded that the districts "'were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives.'" *Id.* at 961 (citation omitted). Finally, legislators testified that the decision to draw majority-minority districts "was made at the outset of the

process and never seriously questioned." *Id.* In those cases, as here, race predominated.

Appellants' attempt to distinguish these cases only reinforces the inexorable conclusion that race predominated. According to Appellants, "Delegate Janis's [s]tatements [d]o [n]ot [s]how [r]acial [p]redominance" because they merely reflect a "routine and correct recitation of th[e] federal non-retrogression command." Appellants' Br. 43. Under this view, any analogy to *Shaw II* is "clearly off-base" as that case "reflected an *inaccurate* construction of the VRA (because it interpreted Section 5's *non-retrogression* command as requiring *additional* minority districts)." *Id.* at 43 n.3. But this argument only proves Appellees' point: Appellants concede that the *manner* of achieving the "paramount" objective of VRA compliance is determinative in evaluating whether race predominated. And in fact, Delegate Janis's strictly numerical interpretation of retrogression precisely "reflect[s] [the] inaccurate construction of the VRA," condemned in *Alabama*, 135 S. Ct. at 1271, 1273 ("Alabama's mechanical interpretation of § 5 can raise serious constitutional concerns."). In short, Delegate Janis's application of VRA principles is, contrary to Appellants, anything but "routine and correct."[9]

To overcome this core logical inconsistency in their argument, Appellants resort to denying altogether that Delegate Janis ever mentioned achieving a

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[9] While Appellees contend that Delegate Janis's efforts to comply with the VRA were misguided, they do not doubt his good faith regarding his stated goals. *See Smith v. Beasley*, 946 F. Supp. 1174, 1208 (D.S.C. 1996) ("[T]he good faith of the legislature does not excuse or cure the constitutional violation of separating voters according to race.").

particular racial composition in CD3, asserting that he "simply repeated the Section 5 truism" that retrogression is prohibited and "never said" this entails "maintain[ing] at least as large a percentage" of BVAP as under the Benchmark Plan. Appellants' Br. 44-45. Remarkably, on the very same page, Appellants quote Delegate Janis's statement that retrogression means "'[w]e can have no less' BVAP 'percentage of African-American voters than percentages that we have under the existing lines.'" *Id.* at 45 n.4 (quoting J.S. App. 22a and citing JA 119-20, 357).

At bottom, Delegate Janis's comments confirm that avoiding retrogression was his principal motivation in drawing CD3 and the way he achieved this prime directive was through a numerical racial target. Accordingly, "[r]ace was the criterion that," in Delegate Janis's view, "could not be compromised," and all other considerations "came into play only after the race-based decision had been made." *Shaw II*, 517 U.S. 907

And, remarkably, there is yet more. Delegate Janis not only openly declared that he prioritized race and explained how he accomplished his racial goal, he also expressly disavowed any consideration of partisan performance. When asked whether he had "any knowledge as to how this plan improves the partisan performance of those incumbents in their own district[s]," Delegate Janis answered unequivocally: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." JA 456.

The District Court found it "appropriate to accept the explanation of the legislation's author as to its purpose." J.S. App. 23a. Appellants do not, suggesting

the Court ignore these statements as mere platitudes. But these "'explicit and repeated admissions' of the predominance of race . . . made in the course of hearings on the House of Delegates floor," J.S. App. 36a (citation omitted), are not so easily dismissed. *See Bush*, 517 U.S. at 970 (crediting the district court's reliance on "the State's own statements indicating the importance of race"). In short, where the sole mapdrawer expressly declares that race predominated, the District Court did not commit clear error in finding that race predominated.

C. BVAP Threshold

In addition to Delegate Janis's repeated statements that racial considerations predominated above all others, the District Court found it highly persuasive that the General Assembly used a "[r]acial [t]hreshold [a]s the [m]eans to [a]chieve Section 5 [c]ompliance," J.S. App. 20a. And for good reason: The use of a mechanical racial threshold in *Alabama* was the lynchpin in this Court's conclusion that the record there presented "strong, perhaps overwhelming, evidence that race did predominate." 135 S. Ct. at 1271.

The District Court had good reason to conclude that the General Assembly applied a racial threshold in creating CD3: *Appellants' own expert* testified that the General Assembly adopted a 55% BVAP floor in an attempt to obtain Section 5 preclearance. J.S. App. 20a. Mr. Morgan, a consultant who assisted in drawing the 2011 House of Delegates Plan, JA 817, wrote that the General Assembly "found [the 55% BVAP floor] appropriate to comply with Section 5 for House [majority-minority] Districts" and "obtain Section 5 preclearance, even if it meant raising the

Black VAP above the levels in the benchmark plan." JA 518. According to Mr. Morgan, the General Assembly then "acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the [CD3] Black VAP at 56.3%." *Id.*

Mr. Morgan's statements were corroborated by the legislative record. Indeed, when Delegate Janis was questioned whether he had "any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50," or whether the 55% threshold was "just a number that has been pulled out of the air," Delegate Janis justified the use of a 55% BVAP floor as "weighing a certainty against an uncertainty." JA 397-98.[10] Other members of the General Assembly also sought to justify CD3—albeit incorrectly—on the grounds that a 55% BVAP floor was necessary to comply with Section 5. *See, e.g.*, JA 533 ("[W]hen it came to Section 5— . . . we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by [DOJ] is 55.0."); JA 527.

Moreover, Virginia's Section 5 submission consistently uses a 55% BVAP threshold to explain the Plan's impact on racial minorities. Describing the BVAP increase in CD3, the submission states that "both total and voting age populations are increased to over 55 percent." JA 77. It repeats this threshold number *three more times*, once for each of the legislature's other proposed plans. JA 78-80.

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[10] As set forth above, Delegate Janis made clear his belief that any drop in BVAP would constitute retrogression. *See, e.g.*, JA 119-20, 357. Here, he further indicates that meeting or exceeding 55% BVAP would make preclearance a "certainty."

Appellants now argue there was no racial threshold, Appellants' Br. 44, and are quick to dismiss the findings of their own expert as ill-informed, *see id.* at 45 (noting that "[i]f Mr. Morgan had said this," it would be irrelevant since he had no direct knowledge of the General Assembly's goals). But Appellants not only affirmatively offered Mr. Morgan's testimony into evidence, they whole-heartedly *embraced* these legislative facts and Mr. Morgan's conclusions in the District Court. Appellants quoted the legislative record showing that delegates demanded a 55% threshold. Dkt. No. 85 (Int.-Def. Tr. Br. 25-26) (Delegate Dance "advocated a 55% minimum BVAP for majority-black districts," stating in a public hearing "'at least 55 percent performing' was necessary to preserve black voters' ability to elect in House districts") (quoting JA 527). They defended the General Assembly's use of a racial quota, both before and after trial, as justified under Section 5. *See id.* at 26 (arguing "the General Assembly had 'a strong basis in evidence' to believe that Section 5 prohibited reducing [CD3's] BVAP below the benchmark level, and that 55% BVAP was a reasonable level for preserving the ability to elect," and it "acted accordingly when it adopted the Enacted Plan with 56.3% BVAP in [CD3]"); Dkt. No. 106 (Int.-Def. Post-Tr. Br. 32) (arguing that "[t]he General Assembly . . . had evidence that 55% BVAP was a reasonable threshold for obtaining . . . Section 5 preclearance").

Of course, in the wake of *Alabama*'s unequivocal rejection of mechanical racial thresholds, it is no surprise Appellants have abandoned their previous endorsement of the 55% BVAP floor.[11] But Appellants'

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[11] Though even now, Appellants cite the application of a 55% BVAP floor in the House of Delegates Plan as a "very good

efforts to bury the damning evidence they themselves advanced cannot undo the strong foundation undergirding the District Court's finding that the General Assembly's insistence on a predetermined racial threshold predominated over traditional districting principles.

D. Traditional Districting Principles

As set out above, this was a direct evidence case. There is no need to look to circumstantial evidence to confirm what Delegate Janis stated expressly about his predominant racial motives. *See Miller*, 515 U.S. at 916 ("The plaintiff's burden is to show, *either* through circumstantial evidence of a district's shape and demographics *or* more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.") (emphasis added). Nonetheless, the circumstantial evidence of CD3's "shape and demographics" fully supports the conclusion that the General Assembly subordinated traditional redistricting criteria, such as compactness, contiguity, and respect for political subdivisions, to racial considerations in crafting CD3.

1. CD3 Deviates from Traditional Districting Principles

The focus on race is evident in CD3's shape. "[R]eapportionment is one area in which appearances do matter," *Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("*Shaw I*") and a district's "bizarre" or "irregular"

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reason[] to believe that this level of BVAP . . . was proper under Section 5" for purposes of CD3. Appellants' Br. 54-55.

shape provides circumstantial evidence that racial considerations predominated, *see Miller*, 515 U.S. at 914. Districts that connect disparate communities by narrowly complying with contiguity requirements are often probative of a racial purpose. *See id.* at 917 (race predominated where narrow land bridges connected areas with high concentrations of black residents); *Shaw II*, 517 U.S. at 903, 905-06 (same where district snaked along freeway collecting areas with black residents); *Moon*, 952 F. Supp. at 1147 (same in predecessor CD3 that had similarly bizarre shape).

By every measure used in Virginia's Section 5 submission, CD3 is Virginia's least compact district. JA 59, 195-96, 850. This is no surprise given Delegate Janis's admission that he did not consider compactness when drawing CD3. JA 125.

CD3 also stretches the limits of contiguity, using the James River to hopscotch white communities and scoop in black enclaves. Although the District Court found CD3 "legally contiguous" because Virginia law allows waterways to connect parts of districts, it recognized that CD3's tenuous use of water contiguity to "bypass white communities and connect predominantly African-American populations . . . contributes to the overall conclusion that the district's boundaries were drawn with a focus on race." J.S. App. 25a-26a. Adherence to the letter of the law is immaterial where manipulation of the contiguity requirement furthers race-based goals.

CD3 also splits more counties and cities—nine splits in all—than any other district and contributes to most of the splits of its neighboring districts. The district with the second-highest number is CD1, with only five splits, two of which are due to CD1's boundary with CD3. JA 198-99, 605-07. CD3 also splits more voting

tabulation districts (VTDs) than any other district. JA 607. The Plan splits 20 VTDs in all, of which CD3 participates in 14. JA 201. The General Assembly used these splits "strategically" as a means of bypassing white population centers to sweep more black communities into CD3. *See* J.S. App. 27a.

2. Appellants' Attempts to Explain Away These Deviations Fail

The facts above are undisputed. Instead, Appellants try to justify these objective flaws in CD3 in three ways.

First, Appellants contend that the District Court simply chose the wrong traditional principles. Appellants' Br. 50 (arguing the majority focused on "*other* traditional principles the Legislature prioritized *lower* than core preservation and incumbency protection"). But, inconvenient as they may be for Appellants, these objective factors were not hand-picked by the District Court. They are the hallmark "traditional race-neutral districting principles" specifically identified by *this* Court. *Miller*, 515 U.S. at 916 (listing "compactness, contiguity, and respect for political subdivisions"). Indeed, these are the very factors the Court evaluated in *Alabama*. *See* 135 S. Ct. at 1270.

Appellants' objection to "the majority's principles," Appellants' Br. 51, moreover, reveals the fundamental flaws in their preferred definition of "predominance." Appellants contend that "plaintiffs' threshold burden is to establish . . . a conflict" between race and traditional districting principles. *Id.* at 25. Stripped to its essence, Appellants ask the Court to hold, contrary to *Miller*, that "direct evidence going to legislative purpose" cannot alone establish racial predominance.

515 U.S. at 916. They cite no case for this "conflict" theory because there is none. Indeed, such a standard would overturn *Miller* by elevating "circumstantial evidence of a district's shape and demographics" to a threshold requirement. *Id.*

But Appellants' misconception of the law runs deeper. According to Appellants, it is not enough for plaintiffs to demonstrate a conflict between race and traditional districting criteria, as Appellees have done here. Rather, under their view, plaintiffs must demonstrate "violations" of any and every possible race-neutral explanation, even those offered by self-described "strangers to the redistricting process," Appellants' Br. 46 n.4. In other words, the racial explanation must cancel out all other districting criteria in order for race to predominate, transforming plaintiffs' burden from showing that race was the *predominant* factor to showing that race was the *only* factor.

That is not the law. Courts often find that race predominates even when a legislature considers and satisfies non-racial goals. *See, e.g.*, *Alabama*, 135 S. Ct. at 1263 (legislature "sought to achieve numerous traditional districting objectives," but "placed yet greater importance" on avoiding retrogression); *Shaw II*, 517 U.S. at 907 ("That the legislature addressed [other] interests does not . . . refute the fact that race was the legislature's predominant consideration."); *Bush*, 517 U.S. at 963 (race predominated even though "[s]everal factors other than race were at work," including an "unprecedented" focus on "incumbency protection"); *Clark v. Putnam Cty.*, 293 F.3d 1261, 1270 (11th Cir. 2002) ("Race may be shown to have predominated even if . . . factors other than race are shown to have played a significant role in the precise

location and shape of those districts.") (citation omitted); *Moon*, 952 F. Supp. at 1146-48 (race predominated where "the Legislature sought to protect and indeed enhance" the district's BVAP ratio, even while considering political partisanship, incumbent protection, and communities of interest); *see also* J.S. App. 32a n.23 ("[W]hen racial considerations predominated in the redistricting process, the mere coexistence of race-neutral redistricting factors does not cure the defect.").

Accordingly, Appellants' contention that "District 3 does not subordinate traditional districting principles" because it supposedly does not conflict with their preferred "neutral principles," Appellants' Br. 50, fails at every level. Delegate Janis's prioritization of race resulted in deviations from principles of compactness, contiguity, and respect for political subdivision boundaries, and thus had a "direct and significant impact" on the drawing of CD3, *Alabama*, 135 S. Ct. at 1271.

Second, Appellants contend that any deviations from compactness, contiguity, and respect for political subdivisions are of no moment, either because these principles are not that important or because the deviations are not that severe. Appellants' Br. 51-53. But while Appellants shrug at these traditional criteria, this Court has long held them in high regard for evaluating alleged racial gerrymanders. Indeed, Appellants' contention that compactness is "inherently manipulable" and therefore meaningless, Appellants' Br. 52, ignores both the Court's precedent, *Shaw I*, 509 U.S. at 647, and the requirements of the Virginia Constitution, Va. Const. art. II, § 6 ("Every electoral district shall be composed of contiguous and compact territory."). And the numerous locality splits

are especially probative where the mapdrawer extolled the virtues of avoiding them. *See, e.g.*, JA 352 ("Wherever possible, we also attempt to keep together jurisdictions and localities, counties, cities, and towns.").

It hardly matters, moreover, that CD3 is not as grossly non-compact as the original *Shaw* district, *see* Appellants' Br. 52, that water contiguity is technically "legal," *id.* at 53, or that Appellees' alternative plan may have had just one fewer locality split, *id.* at 50-51. [12] None of these factors is a stand-alone requirement racial gerrymandering plaintiffs must prove has been "violated" in order to prevail. Instead it is the series of "irregularities and inconsistencies with respect to the[se] traditional districting criteria" that helps further establish that race was the driving force behind district lines. J.S. App. 30a. The District Court would have been remiss to ignore the red flags raised by this circumstantial evidence, and its reliance on that evidence to bolster its conclusion that race predominated is certainly not clear error.

Third, Appellants contend that it was not *race* that subordinated "the majority's principles," but partisan considerations undertaken in the guise of core preservation. Appellants' Br. 51. But Appellants' refrain that core preservation explains away the

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[12] Appellants' repeated attempts to defend the racial gerrymander in CD3 by attacking Appellees' alternative plan, *see, e.g.*, Appellants' Br. 7-8, 49, 51-52, ignores one key fact: Appellees' alternative plan is not on trial. Appellees offered their alternative plan merely as evidence that some objective flaws in the Enacted Plan could have been avoided, *see* Appellees' Mot. to Dismiss or Affirm 29-30, not as a cure to the deep-seated racial gerrymander of CD3. The District Court relied on it for this limited purpose. J.S. App. 28a-29a.

overwhelming evidence of racial predominance rings hollow, as it turns a deaf ear to this Court's precedent, the legislative record, and the map itself.

As an initial matter, this Court has emphasized that core preservation "is not directly relevant to the origin of the *new* district inhabitants." *Alabama*, 135 S. Ct. at 1271. Indeed, as the District Court found (and Appellants do not dispute), the new inhabitants of CD 3 "were predominantly African-American." J.S. App. 30a.

Additionally, Appellants grossly inflate the role of core preservation in both the redistricting process and the resulting district. The allegedly "preferred" principle of core preservation appears nowhere in the Senate Criteria that Appellants believe provides "a preexisting 'framework' against which to judge the Enacted Plan." JA 97; Dkt. No. 85 (Int.-Defs. Tr. Br. 18). And when speaking on the House floor, Delegate Janis expressly rank-ordered core preservation "[t]hird" after population equality and non-retrogression. JA 352.

To the extent the General Assembly considered district cores, it did little to respect them. CD3 needed 63,976 additional residents to meet the ideal population, but instead of just adding people to the district, the General Assembly *removed* 58,782 residents. JA 608-09, 614. "Far from attempting to retain most of the Benchmark Plan's residents within the new district borders," J.S. App. 29a-30a, the General Assembly removed over 180,000 people from their existing districts simply to increase the population of CD3 by 63,976 people. JA 614. This massive dissection of district populations followed racial lines: "Tellingly, the populations moved out of the Third Congressional District were predominantly

white, while the populations moved into the District were predominantly African-American." J.S. App. 30a (citing JA 609). These large population swaps only demonstrate that, as promised, Delegate Janis's interest in core preservation gave way to his "nonnegotiable" effort to achieve a specific racial composition in CD3. JA 370.

Finally, even if core preservation were a primary concern in redrawing CD3, this hardly undermines CD3's racial purpose, as the "core" of CD3 is, historically, a racial gerrymander. In 1997, CD3 was struck down as an unconstitutional racial gerrymander. *Moon*, 952 F. Supp. 1141. As here, that historical district crisscrossed the James River to sweep in black communities. Although the General Assembly was thereafter instructed to craft a remedial plan, that plan was never challenged, let alone blessed by the court as "'conform[ing] to all requirements of law.'" Appellants' Br. 51 (quoting *Moon*, 952 F. Supp. at 1151). Still, Appellants contend that any flaws in CD3 "were all *inherited* from Benchmark District 3" and are therefore immune from judicial scrutiny. *Id.* at 50. But the lack of a judicial challenge to the Benchmark district hardly exonerates CD3. The mere passage of time cannot cure a racial gerrymander that may have persisted for decades.

In any event, even if Benchmark CD3 had received a judicial seal of approval, Enacted CD3 only exacerbates the district's problems in ways that echo the version deemed unconstitutional in *Moon*. For instance, while the 1997 remedial plan omitted the City of Petersburg from CD3, Enacted CD3 once gain engulfs that city, while further splitting the City of Norfolk. *See* JA 580-81. While the 1997 remedial plan

dropped the BVAP of CD3 from 61.17% to 50.47%, the BVAP of Enacted CD3 shot up to 56.3%. JA 427.

Indeed, Enacted CD3 can be described in strikingly similar terms to the district struck down in *Moon*. Like the *Moon* district, CD3 begins in the southeast corner in the "tidewater cities of Norfolk, Suffolk, and Portsmouth." 952 F. Supp. at 1144; *see also* JA 191-95; Int. Ex. 8. "It crosses the Chesapeake Bay to include portions of . . . Hampton and Newport News where the African–American population is the majority, using only the open water of the Chesapeake Bay and the James River to connect the disparate and non-contiguous portions of these two small cities. The District then crosses the James River into the largely rural Surry County, recrossing the James River to take in all of the African–American majority Charles City County." 952 F. Supp. at 1144; *see also* JA 191-94. "To the south the District runs through Prince George County" and "terminat[es] some 30 miles away in the City of Petersburg." 952 F. Supp. at 1144; *see also* JA 191-95; Int. Ex. 8. Both districts take in part of Henrico County "before reaching the more built up and heavily black eastern suburbs of Richmond." 952 F. Supp. at 1144; *see also* JA 191-94; Int. Ex. 8.

Thus, both the *Moon* district and the enacted district hopscotch repeatedly across the James River to slice apart cities along racial lines, connecting the tidewater area to the east with Richmond to the west. *See* J.S. App. 25a (CD3 "reflect[s] both an odd shape and a composition of a disparate chain of communities, predominantly African-American, loosely connected by the James River").[13] In short, the core of CD3 is

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[13] The District Court's remedial plan specifically unravels these aspects of the district. *See* Remedy Order 17.

itself an unconstitutional racial gerrymander. *Shaw* defines both its history and its legacy.

E. Racial Sorting of VTDs

The District Court was further persuaded that race predominated by evidence provided by Appellees' expert Dr. McDonald that, among the high-performing Democratic VTDs that could have been placed within CD3, the General Assembly chose to include those with significantly higher BVAPs. J.S. App. 30a; *see* JA 248, 616. Based on all of the evidence, Dr. McDonald concluded that race, and not politics, explains CD3.

Appellants launch a spate of attacks on Dr. McDonald's analysis, none of which undermines his fundamental conclusions. First, Appellants rely on their own expert's analysis to purportedly show that the VTD swaps among districts "had a political effect identical to their racial effect." Appellants' Br. 47. But the District Court found Appellants' expert not credible. *See* J.S. App. 21a n.16 (finding "significant" that Mr. Morgan "proffers no academic work, that he does not have an advanced degree, that his undergraduate degree was in history, that he has never taken a course in statistics, . . . and that he miscoded the entire city of Petersburg's VTDs"); *id.* at 34a n.25 (noting "Mr. Morgan's analysis was based upon several pieces of mistaken data, a critical error"). The District Court is in a unique position to make credibility determinations that, accordingly, "can virtually never be clear error." *Anderson v. City of Bessamer City*, 470 U.S. 564, 575 (1985).

Appellants next protest that Dr. McDonald examined VTDs "up to *thirty miles away*" from CD3's boundary. Appellants' Br. 48. But they ignore that the

General Assembly itself included far-flung VTDs when redrawing district boundaries. *See* JA 868-73.

Appellants further fault Dr. McDonald for "lump[ing] together all 55% and above Democratic VTDs" in his race versus party analysis, claiming this is akin to the expert analysis deemed insufficient in *Cromartie II*. Appellants' Br. 48. But the expert in *Cromartie II* based his analysis on precincts that "were at least *40%* reliably Democratic." 532 U.S. at 247. The Court found this cutoff inappropriate for distinguishing between racial and partisan differences. *Id.* Dr. McDonald's analysis, by contrast, examined the BVAP of only those VTDs that were over 55% Democratic, "which is above the accepted level political scientists consider to be competitive." JA 248.[14] Appellants cannot show that the District Court committed clear error by concluding that an overwhelming majority Democratic voter share provides a basis for measuring the relative racial and political impact of VTD swaps.

Even if the Court were to credit Appellants' analysis, all it establishes is that packing black residents into CD3 *also* helped Republicans. This reveals another fundamental flaw in Appellants' legal theory. Just because a districting plan benefits a certain group does not mean the plan was drawn primarily for that purpose. Indeed, Appellants' expert

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[14] *See, e.g.*, Gary C. Jacobson, *The Electoral Origins of Divided Government: Competition in U.S. House Elections, 1946-1988* 26 (1990) ("The two thresholds of marginality commonly found in the literature are 55% and 60% of the vote. Winning candidates who fall short of the threshold are considered to hold marginal seats; those who exceed it are considered safe from electoral threats.").

"conceded" that the Plan's impact was consistent with race as the predominant factor behind CD3. JA 834.

Ultimately, even if there is a correlation between race and politics, where the mapdrawer declares he looked only at race, and did not "look[] at" political performance, JA 456, the District Court's finding that the expert testimony supports its conclusion that race predominated is not "clear error."

III. APPELLANTS' ARGUMENT THAT POLITICS PREDOMINATED IS BASELESS

The mountain of evidence outlined above fully supports the District Court's finding that race predominated. Appellants cannot wish away the unequivocal statements of the Plan's sole author, claw back their own evidence of a 55% BVAP threshold, or set aside circumstantial evidence of shape and demographics demonstrating CD3's predominant racial purpose.

Nonetheless, Appellants insist that Delegate Janis's "overriding objective" was, in fact, to achieve a very specific partisan aim. Appellants' Br. 37. According to Appellants, Delegate Janis drew CD3, first and foremost, to "strengthen[] Republican districts" and entrench the "8-3 pro-Republican split." *Id.* at 5. But this purported mission is unsupported by the record. Moreover, even crediting Appellants' contention that partisan politics was Delegate Janis's ulterior motive all along, his express use of race to achieve his supposed partisan goals triggers strict scrutiny.

A. The Record Does Not Support Appellants' Factual Assertion that Politics Drove CD3

The District Court was unpersuaded by Appellants' repeated assertions that Delegate Janis's predominant purpose in drawing CD3 was to maintain an 8-3 Republican advantage statewide. J.S. App. 16a n.12, 30a-36a. And for good reason. This purported goal finds no support in the legislative record; it is never mentioned in the official redistricting guidelines, JA 97; Appellants offered no trial testimony from Delegate Janis or any other legislator to that effect; and Delegate Janis expressly declared: "I haven't looked at the partisan performance. It was not one of the factors that I considered." JA 456. Indeed, although Appellants refer to the "8-3" partisan divide no less than *eleven* times in their brief, Delegate Janis never once uses the term in describing his objectives.

Appellants point to the legislative record to contend that Delegate Janis's "overriding objective was 'to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election,' when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008)." Appellants' Br. 37. The term "overriding objective" is Appellants' own creation and is not found in the legislative record. The record instead reveals that "respect[ing] . . . the will of the Virginia electorate" came "[t]hird" among Delegate Janis's redistricting considerations, after population equality and non-retrogression. JA 352; *see also* JA 365 ("[T]he third criteria that we tried to apply was, to the greatest degree possible, we tried to respect the will of the Virginia electorate as it was expressed in

the November 2010 congressional elections.").[15] To the extent this statement reflects a partisan motive, the fact that the Plan's author explicitly subordinated it to race definitively disproves that politics predominated the redistricting process.

Appellants' contention that "respect[ing] the will of the Virginia electorate" was code for maintaining the 8-3 partisan split is also not supported by the record. Delegate Janis stated plainly that "what [he] meant was we based the territory of each of these districts on the core of the existing congressional districts" in an attempt to make a "minimal amount of change or disruption to the current boundary lines." JA 352, 365. But as discussed above, *supra* pp. 36-37, the Plan's removal of over 180,000 people from their existing districts to increase the population of CD3 by 63,976 only demonstrates that, in accordance with his rank-ordering of priorities, Delegate Janis subordinated any interest in core preservation to his nonnegotiable effort to achieve a specific racial composition in CD3.

Extrapolating from Delegate Janis's statement that "[w]e respected the will of the electorate by not placing . . . two congressmen in a district together" and by not "draw[ing] a congressman out of his existing district," JA 365, Appellants contend that the map drawer

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[15] Appellants' argument on this point is confused. They first state that this goal was Delegate Janis's "overriding *discretionary* objective," Appellants' Br. 3, acknowledging that it came only "after the federal equal population and non-retrogression mandates," *id.* at 4. Later, however, Appellants boldly assert, without qualification, that this was Delegate Janis's "overriding objective." *Id.* at 37. While Appellants tout Delegate Janis's statement as "a display of candor rarely seen in redistricting," *id.*, their own distortions are all the more conspicuous.

sought to maintain and strengthen Republican advantage.[16] But Delegate Janis was precise in his statement of intent: although he sought to avoid pitting incumbents against one another, this goal was taken into account only after he established a certain racial composition in CD3. Taken together, Delegate Janis's statements support only one conclusion: partisan performance was disavowed as a factor altogether, and even if he avoided actively pairing or displacing incumbents, these goals were decidedly secondary to race.

Appellants search in vain for evidence outside the legislative record to advance their cause. First, Appellants inexplicably contend that *they*, self-described "strangers to the redistricting process," Appellants' Br. 46 n.4, "effectively drew their own districts." *Id.* at 39. This assertion contradicts Delegate Janis's testimony and Appellants' own assertions on the record. Delegate Janis clearly stated that he spoke with congressmen only to seek their input about communities of interest. JA 366 ("[W]e also tried not to split local communities of interest based on the recommendations we received from the current members of the congressional delegation."); *see also* JA 371, 452. Delegate Janis never even implied, much less stated, that congressmen drew their own districts.

Moreover, Delegate Janis considered "recommendations received from each of the 11 currently elected congressmen, both Republican and Democrat, about how best to preserve local communities of interest"

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[16] The remedial plan entered by the District Court also achieves these goals, Remedy Order 21, and Appellants hardly suggest that plan is a Republican gerrymander.

only *after* considering the "mandatory" criterion of non-retrogression. JA 365, 368.

Appellants' discovery responses confirm that their contributions to the Plan were minimal at best. The four congressmen who represented the districts surrounding CD3, and who would have benefitted most from packing black voters into CD3 under Appellants' theory, had almost no input. Wittman (CD1) never spoke to Delegate Janis about redistricting, attended only one meeting about redistricting, which Delegate Janis did not attend, and possessed no draft maps or redistricting-related communications. JA 338-43. Forbes (CD4) did not provide any feedback on the Enacted Plan, attended no meetings related to redistricting, and had no draft maps or communications with the General Assembly about redistricting. JA 303-08. Rigell (CD2) and Cantor (CD7) similarly attested that they had little to no input on the Enacted Plan. JA 297-302, 332-37. Appellants can hardly disclaim involvement during discovery and then proclaim usurpation of the redistricting process on appeal.

Second, Appellants rely extensively on the statements of "contemporaneous commentator[s]" to the redistricting process, Appellants' Br. 38, including an article written by Appellees' expert prior to his engagement in this case and statements by the Plan's opponents. Appellants cannot seriously argue that "commentaries" trump the unequivocal statements of the Plan's sole author. To find otherwise would suggest that the Court look to, for example, news stories "commenting" on legislation, instead of the legislative record, as evidence of legislative intent.

Indeed, the legislative record is replete with statements by the Plan's opponents decrying CD3's

predominant and unjustified use of race. Senator Locke, for instance, objected that CD3 "has been packed" with African Americans, leaving "those African-Americans living in the 1st, 2nd, and 4th congressional districts that abut the 3rd . . . essentially disenfranchised." JA 404. Senator McEachin similarly denounced the "packing" of African Americans in excess of "what is necessary to elect a candidate of choice," thereby "depriving minorities of their ability to influence elections elsewhere." JA 409. In short, Delegate Janis was not the only one who acknowledged the primacy of race; his colleagues openly recognized the race-based redistricting of CD3. The dispute was over whether the use of race was justified, not whether it occurred.

Appellants' final recourse is to a *deus ex machina* that would do away with this troublesome evidence altogether—their suggestion that courts must *assume* post hoc that any plan drawn by politicians was driven primarily by a political objective. *See* Appellants' Br. 28 (the "'assumption' that the Republican-controlled Legislature wanted to protect Republican incumbents is compelled by common sense"); *id.* at 38 (complaining the District Court's opinion implies that "for the first time in American history and for some wholly unexplained reason, a legislature did not want to re-elect congressional incumbents of the majority party"). Appellants cannot fathom that Delegate Janis would prioritize anything other than *their* political interests.

But Appellants' "assumption" is belied not only by Delegate Janis's statements, but also by this Court's recent decision in *Alabama*, which assumes no such thing, even though the *Alabama* district court found political explanations in the record evidence. *See Ala. Legis. Black Caucus v. Alabama*, 989 F. Supp. 2d 1227,

1289, 1294, 1301 (M.D. Ala. 2013) (noting the Legislature "considered partisan data to preserve the Republican supermajority in the Legislature," finding "statements by Republicans that they desired to gain seats with the new districts speak to partisan, not racial, motives," and criticizing dissent for "ignor[ing] the stronger evidence that partisanship explains what happened here").

At bottom, Appellants ask this Court to assume that no matter what politicians say to their constituents or in legislative session, their selfish pursuit of political power is always their *raison d'etre*. The Court should reject this profoundly cynical view. Delegate Janis could not have been clearer in his prioritization of race over all other criteria, including partisan politics. Appellants cannot establish that it was "clear error" for the District Court to take him at his word.

B. Use of Race as a Proxy for Partisan Goals Only Further Establishes Racial Predominance

Even if the Court believed Appellants' version of Delegate Janis's priorities—instead of Delegate Janis's—Appellants' contention that the General Assembly employed a BVAP floor as the means of achieving its supposed political ends hardly exonerates CD3. On the contrary, the General Assembly's use of race as a proxy for political goals would necessarily trigger strict scrutiny.

Appellants contend that the General Assembly's use of a racial threshold "could not violate *Shaw* because achieving that floor was the best . . . way to accomplish the Legislature's conceded partisan and incumbency protection objectives." Appellants' Br. 18. In other words, because "preserving District 3's . . . racial

percentage[]" served a partisan goal, any "misinterpretation" of Section 5 in adopting that racial percentage is irrelevant, as the district is immune from challenge. *Id.*

"But the fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations." *Bush*, 517 U.S. at 972. Rather, the General Assembly's "use of race . . . as a proxy to protect the political fortunes of adjacent incumbents" would only *confirm* that race was the predominant factor in drawing CD3. *Id.* at 972-73; *see also id.* at 997 (state may not "use race as a proxy to serve other interests") (Kennedy, J., concurring).

Thus, Appellants' contention that there can be no *Shaw* violation where race-based redistricting coincided with political objectives, *see, e.g.*, Appellants' Br. 24-25, 26, 27, 30, 39-40, is directly contradicted by this Court's precedent. A racial classification is no less suspect simply because it achieves a non-racial goal. Whenever a legislature chooses race as the tool to accomplish its objectives, "a racial stereotype requiring strict scrutiny is in operation." *Bush*, 517 U.S. at 968; *see also Clark*, 293 F.3d at 1271-72 ("Incumbency protection achieved by using race as a proxy is evidence of racial gerrymandering" and "indicative of the sort of racial stereotyping that the Supreme Court has condemned as resembling political apartheid").

Accordingly, it matters not whether race was used for its own sake or for some non-racial purpose. *See Bush*, 517 U.S. at 979 (race predominates where district was "racially motivated and/or achieved by the use of race as a proxy"). In either event, strict scrutiny is triggered. Appellants' suggestion that the partisan

ends justify the racial means only bolsters the District Court's finding of racial predominance.

IV. *CROMARTIE II*'S DISCUSSION OF CIRCUMSTANTIAL EVIDENCE IS INAPPOSITE

According to Appellants, the direct and circumstantial evidence outlined above simply makes no difference. No matter what the mapdrawer said he did, no matter the numerical racial threshold applied, no matter what the district actually looks like, under Appellants' view *Shaw* plaintiffs cannot prevail without an alternative map that "achieves the legislature's 'legitimate political objectives.'" Appellants' Br. 27 (citing *Cromartie II*, 532 U.S. at 258). Indeed Appellants would have the Court believe that *every* racial gerrymandering claim rises and falls on the plaintiffs' alternative plan. *See id.* at 41. But *Cromartie II* does not provide a get-out-of-jail-free card for racial gerrymanders.

In fact, *Cromartie II*, which examined the remedy to the original *Shaw* district, actually supports *Appellees*' position. In 1992, plaintiffs challenged North Carolina's Twelfth Congressional District, claiming the General Assembly had segregated voters into districts on the basis of race without compelling justification. In *Shaw I*, this Court held that the allegation stated a claim for relief. 509 U.S. at 658. The district was struck down on remand, and in *Shaw II*, the Court affirmed the finding of racial predominance and further held that the district failed to satisfy strict scrutiny. 517 U.S. 899.

The legislature then redrew the district "guided by two avowed goals: (1) curing the constitutional defects of the1992 Plan by assuring that race was not the

predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation." *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 413 (E.D.N.C. 2000), *rev'd*, 532 U.S. 234 (2001). The end result was a district with a significantly lower BVAP, decreased number of county splits, and 41.6% of its previous area. *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999) ("*Cromartie I*").

Plaintiffs challenged the new district as a racial gerrymander. *Id.* Unsurprisingly given the auspices of the new district, plaintiffs could muster "only circumstantial evidence in support of their claim." *Id.* at 547. The district court granted summary judgment in plaintiffs' favor "even though they presented no direct evidence of intent." *Id.* at 549. This Court reversed, noting that summary judgment is inappropriate where "[r]easonable inferences" from the circumstantial evidence "can be drawn in favor of a racial motivation finding or in favor of a political motivation finding." *Id.* at 552.

"On remand, the parties undertook additional discovery." *Cromartie II*, 532 U.S. at 239. The district court once again found in favor of plaintiffs, based primarily on circumstantial evidence of the district's shape and demographics, expert analysis of precincts, and two stray pieces of "direct" evidence: a legislator's "allu[sion] . . . to a need for 'racial and partisan' balance," and an email reporting that a senator had "moved Greensboro Black community into the 12th." *Id.* at 253-54 (citation omitted). This Court reversed, holding that, on the largely circumstantial record, the plaintiffs had "not successfully shown that race, rather than politics, predominantly accounts for" the resulting map. *Id.* at 257. While the Court found that the single email offered some "'direct' evidence" in

support of the lower court's conclusion, it found it considerably "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases." *Id.* at 254 (citing statements from *Miller*, *Bush*, and *Shaw II* that states set out to draw majority-minority districts). That kind of direct evidence is discussed at length *supra* and is precisely the type of evidence upon which the District Court in this case relied.

Appellants distort both *Cromartie II*'s holding and its history in asserting that "'direct evidence' of a racial motive 'says little or nothing about whether race played a *predominant* role comparatively speaking.'" Appellants' Br. 39 (quoting *Cromartie II*, 532 U.S. at 253). This passage merely reflects that the specific, paltry "direct" evidence of racial predominance *in that case* was entirely unpersuasive. Indeed, there the legislative record plainly revealed an "avowed goal[]" to "assur[e] that race was *not* the predominant factor in the new plan." *Hunt*, 133 F. Supp. 2d at 413 (emphasis added).

Cromartie II concluded by stating that *"[i]n a case such as this one,"* plaintiffs "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Id.* at 258 (emphasis added). Appellants read far too much into this passage, suggesting that it renders moot the previous twenty pages of the opinion. But this approach applies where the legislature disavows racial motives and the Court must rely on circumstantial evidence to divine whether racial or political objectives truly drove redistricting. *See id.* at 242 (circumstantial evidence of racial population figures "will not, by itself, suffice to prove that a

jurisdiction was motivated by race in drawing district lines when the evidence also shows a high correlation between race and party preference") (quoting *Cromartie I*, 526 U.S. at 552). Where the *Cromartie II* plaintiffs presented little to no direct evidence that race was the predominant factor, the Court accordingly required an alternative plan as additional circumstantial proof.

Here, by contrast, Appellees presented unequivocal statements of the Plan's sole map drawer that race predominated over politics, together with a wealth of supporting evidence. Where the map drawer has unambiguously and expressly declared that achieving a certain racial composition in CD3 was prioritized over core preservation and incumbency protection, and *disavowed* consideration of political performance, no alternative map is required to retroactively disentangle racial and political motives. "Out right admissions of impermissible racial motivation are infrequent," but, as this case demonstrates, they do sometimes occur, and where they do, plaintiffs need not "rely upon other evidence." *Cromartie I*, 526 U.S. at 553. In light of the direct evidence available here, *Cromartie II*'s circumstantial evidence requirement does not apply.

Thus, contrary to Appellants' suggestion, *Cromartie II* most assuredly did not overturn this Court's well-established rule that racial gerrymandering plaintiffs may establish predominance "*either* through circumstantial evidence of a district's shape and demographics *or* more direct evidence going to legislative purpose." *Miller*, 515 U.S. at 916 (emphasis added); *see also Alabama*, 135 S. Ct. at 1267 (same); *Shaw II*, 517 U.S. at 905 (same); *Cromartie I*, 526 U.S. at 547 (same). A plaintiff need not provide any

circumstantial evidence, let alone a particular type of circumstantial evidence, in order to establish predominance where the direct evidence evinces an avowed racial purpose.

The District Court properly found as much, noting that compared to *Cromartie II*, which included "overwhelming evidence in the record 'articulat[ing] a legitimate political explanation for [the State's] districting decision,'" Appellants' "post-hoc political justifications for the 2012 Plan in their briefs" hardly stacked up against the abundance of direct and circumstantial evidence of race as the predominant purpose. J.S. App. 33a (quoting *Cromartie II*, 532 U.S. at 242).

Like *Cromartie II*, "[t]he issue in this case is evidentiary." 532 U.S. at 241. *Cromartie II* does not instruct courts to close their eyes to direct evidence of race-based redistricting for lack of an alternative plan.

V. THE DISTRICT COURT PROPERLY APPLIED STRICT SCRUTINY

Appellants' argument that the District Court misapplied the narrow tailoring requirement only demonstrates their own fundamental misunderstanding of the standard.

The District Court reconsidered and reaffirmed its opinion on narrow tailoring in light of *Alabama*.

> In *Alabama*, the Court made clear that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in majority-minority districts. Rather, Section 5 requires legislatures to ask the following question: "To what extent must we preserve existing

> minority percentages in order to maintain the minority's present ability to elect its candidate of choice?" . . . . Specifically, the Court in *Alabama* noted that it would be inappropriate for a legislature to "rel[y] heavily upon a mechanically numerical view as to what counts as forbidden retrogression."

J.S. App. 39a (quoting *Alabama*, 135 S. Ct. at 1272-74). The District Court found that, as in *Alabama*, the General Assembly here "relied heavily on a mechanically numerical view as to what counts as forbidden retrogression" and that it lacked a "'strong basis in evidence' for doing so." *Id.* at 40a.

Indeed, the District Court could hardly hold otherwise in light of the record before it. There was no dispute below—and Appellants concede here, Appellants' Br. 56—that the General Assembly performed no analysis whatsoever of racial voting patterns to determine "'[t]o what extent [it] must preserve existing minority percentages in order to maintain the minority's present ability to elect its candidate of choice." J.S. App. 39a (quoting *Alabama*, 135 S. Ct. at 1274). Rather the *only* attempted means of compliance with Section 5 was a numerical racial target. As Delegate Janis explained, he believed that *reducing* the BVAP of CD3 would constitute retrogression and that *increasing* the BVAP above a 55% threshold would ensure preclearance. JA 357, 398.

But this "mechanically numerical view" *defied* all available evidence suggesting that preserving the minority's ability to elect its candidate of choice did not require maintaining the benchmark BVAP—let alone *increasing* it well above the 55% BVAP threshold. Congressman Scott, "a Democrat supported by the

majority of African-American voters," has long represented CD3 with overwhelming support. J.S. App. 40a. Under the reconfigured district, "he won by an even larger margin, receiving 81.3% of the vote." *Id.* The General Assembly essentially closed its eyes to the actual electoral history of the district in determining what was required by Section 5.

Appellants contend that the House of Delegates plan adopted a year earlier "with a 55% or higher BVAP in all majority-black districts" provided evidentiary support for the use of that threshold in CD3. Appellants' Br. 54-55.[17] But a myopic focus on this one plan fails to consider the *other* legislative plan adopted by the General Assembly and precleared by DOJ that same year, in which all five majority-minority Senate districts were below this threshold. JA 626-27; Int. Ex. 34 at 24. Indeed, DOJ had previously *twice* precleared CD3 with BVAPs lower than 55%. JA 580-83; Pl. Exs. 20, 22. This record provides no basis in evidence whatsoever for believing that Section 5—or even DOJ preclearance—required a 55% BVAP floor.

Appellants next construct a counterfactual world, hypothesizing about how DOJ would have responded if Virginia had decreased the BVAP of CD3 to less than 30%. Appellants' Br. 56. But this hypothetical falsely assumes that the only alternative to a baseless BVAP increase in a district that is already electing the minority's candidate of choice with overwhelming

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[17] Appellants do not suggest that the General Assembly even tried to examine the auspices of the 55% BVAP floor in the House of Delegates Plan, which was applied to twelve different districts in different parts of the state. That Plan, meanwhile, is also the subject of a racial gerrymandering challenge that is pending on a Jurisdictional Statement before this Court. *See Bethune-Hill v. Va. State Bd. of Elections*, No. 15-680 (docketed on Nov. 23, 2015).

support is a drastic decrease to the absolute minimum BVAP percentage that DOJ might deem acceptable in evaluating Section 5 compliance. As demonstrated by the District Court's remedial plan, however, a reasonable analysis of all relevant criteria results in a reasonable district that easily satisfies Section 5. *See* Remedy Order at 24-25.

Ultimately, Appellants' argument is that CD3's predominant use of race was narrowly tailored to the General Assembly's purported goal of protecting incumbents. *See* Appellants' Br. 56 (arguing that any reduction in BVAP "was *foreclosed* by the neutral objectives since it inherently endangered incumbents"). But that is simply not the standard. Strict scrutiny review inures only upon the predominant use of race in drawing district lines; Appellants cannot at this point rehash failed arguments that incumbency protection predominated. And Appellants bear the burden of demonstrating that the General Assembly had "*good reasons* to believe" that its "use [of a] racial threshold[]" was compelled by *Section 5*, not by its own political objectives. *Alabama*, 135 S. Ct. at 1274. Indeed, in arguing that Delegate Janis adopted a racial threshold to "directly further[]" his "incumbency-protection objective," Appellants' Br. 56, Appellants once again concede the use of race as a proxy for partisan goals, thereby triggering and failing strict scrutiny in one fell swoop.

Strict scrutiny is not, as Appellants would have it, an amorphous standard of review that allows the government to justify the use of race by invoking the VRA talismanically without analysis or evidence or by using race to achieve its other objectives. Because the General Assembly failed to "t[ake] any steps to

narrowly tailor" its use of race in drawing CD3, *Moon*, 952 F. Supp. at 1150, its predominant use of race cannot satisfy strict scrutiny.

CONCLUSION

Appellees respectfully submit that the appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 14-1504

In The
Supreme Court of the United States

ROBERT J. WITTMAN, *et al.*,

Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES

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QUESTIONS PRESENTED

The first question below was added by the Court. Questions 1-4 in Appellees' Jurisdictional Statement are restated as questions 2 and 3 below.

1. Whether Appellants lack standing because none reside in or represent the only congressional district whose constitutionality is at issue in this case.

2. Whether the district court committed clear error in finding that race was the predominant factor in redrawing CD3—triggering strict scrutiny—when the evidence, viewed in the light most favorable to Plaintiffs, supported the court's conclusion that the legislature relied on a 55% racial floor to increase the black voting age population (BVAP) in CD3 from 53.1% to 56.3%, ostensibly to obtain preclearance from the Department of Justice under § 5 of the Voting Rights Act.

3. Whether the district court committed clear error in finding that the legislature's use of race failed strict scrutiny because a 55%-BVAP floor was not needed to protect the ability of African-American voters in CD3 to elect a candidate of choice.

CHANGE IN PARTY NAMES

Appellants' opening brief overlooks the change in party names identified by Appellees on July 22, 2015. The following Appellees, defendants in the district court, were sued in their official capacities as members of the Virginia State Board of Elections:

- Charlie Judd, Chairman of the Virginia State Board of Elections;
- Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections; and
- Don Palmer, Secretary of the Virginia State Board of Elections.

They no longer serve in those capacities. The current officials are:

- James B. Alcorn, Chairman of the Virginia State Board of Elections;
- Clara Belle Wheeler, Vice-Chair of the Virginia State Board of Elections; and
- Singleton B. McAllister, Secretary of the Virginia State Board of Elections.

Under Rule 35.3, appellees Alcorn, Wheeler, and McAllister have been substituted for Judd, Bowers, and Palmer.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CHANGE IN PARTY NAMES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	21
ARGUMENT	26
I. Representative Forbes has standing to appeal	28
II. The district court did not commit clear error in finding that race was the predominant factor in drawing CD3	33
A. Substantial evidence supported the majority's finding that race predominated	33
1. There was sufficient direct evidence of a 55%-BVAP floor	33
2. The 55%-BVAP floor led the legislature to move a significant number of African Americans into CD3	38
3. Intervenors wrongly claim that there was no evidence of "packing"	39
4. Plaintiffs' circumstantial evidence corroborated their direct evidence	42

TABLE OF CONTENTS – Continued

Page

B. Racial floors trigger strict scrutiny even if used for political gerrymandering 43

C. It was not clear error to reject Intervenors' 8-3 entrenchment claim 49

D. The evidence of racial predominance distinguishes this case from *Easley* 54

E. Plaintiffs' Alternative Plan supported their claims, though Plaintiffs were not required to submit one 58

III. The district court did not commit clear error in finding that the use of race was not narrowly tailored to avoid retrogression 62

A. Avoiding retrogression did not require freezing or increasing the BVAP in CD3 63

B. The only defense witness offered no testimony on the narrow-tailoring question 69

C. Narrow tailoring cannot be shown by criticizing the Alternative Plan..... 70

CONCLUSION 73

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 62, 63, 69

Ala. Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) ..... *passim*

Ala. Legislative Black Caucus v. Alabama,
989 F. Supp. 2d 1227 (D. Ala. 2013),
rev'd, 135 S. Ct. 1257 (2015) 66

Anderson v. Bessemer City,
470 U.S. 564 (1985) 27, 54

Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n,
135 S. Ct. 2652 (2015) 29

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 28

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 32

Bethune-Hill v. Va. State Bd. of Elections,
2015 WL 6440332, 2015 U.S. Dist. LEXIS 144511 (E.D. Va. Oct. 22, 2015),
jurisdictional statement docketed,
No. 15-680 ..... 18, 43

Bond v. United States,
131 S. Ct. 2355 (2011) 33

Brooke Grp. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 27

TABLE OF AUTHORITIES – Continued

Page

Bush v. Gore,
531 U.S. 98 (2000) 30

Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

Cantor v. Personhuballah,
135 S. Ct. 1699 (2015) 15

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013) 29

Clements v. Fashing,
457 U.S. 957 (1982) 30

Cosner v. Dalton,
522 F. Supp. 350 (E.D. Va. 1981) 17

Davis v. FEC,
554 U.S. 724 (2008) 29

Diamond v. Charles,
476 U.S. 54 (1986) 28

Easley v. Cromartie,
532 U.S. 234 (2001) ..... *passim*

Fisher v. Univ. of Tex.,
133 S. Ct. 2411 (2013) 70, 71

Georgia v. Ashcroft,
539 U.S. 461 (2003) 64, 65

Hall v. Virginia,
385 F.3d 421 (4th Cir. 2004) 3

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 28

TABLE OF AUTHORITIES – Continued

Page

Horne v. Flores,
557 U.S. 433 (2009) 28

Hunt v. Cromartie,
526 U.S. 541 (1999) 47, 54, 55, 62

Lance v. Coffman,
549 U.S. 437 (2007) 31

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 72

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 28

Meese v. Keene,
481 U.S. 465 (1987) 30, 33

Miller v. Johnson,
515 U.S. 900 (1995) ..... *passim*

Moon v. Meadows,
952 F. Supp. 1141 (E.D. Va.),
aff'd mem., 521 U.S. 1113 (1997) 2, 3, 5

Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656 (1993) 30, 31

Page v. Va. State Bd. of Elections,
58 F. Supp. 3d 533 (E.D. Va. Oct. 7, 2014),
vacated and remanded sub nom. Cantor v. Personhuballah,
135 S. Ct. 1699 (2015) 15, 43

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 46, 70

TABLE OF AUTHORITIES – Continued

Page

Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc., 547 U.S. 47 (2006) 28

Shaw v. Hunt, 517 U.S. 899 (1996) ..... *passim*

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) 11, 63

Sinkfield v. Kelley, 531 U.S. 28 (2000) 31, 32

Storer v. Brown, 415 U.S. 724 (1974) 29

Thornburg v. Gingles, 478 U.S. 30 (1986) 41

United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) 47, 48

United States v. Hays, 515 U.S. 737 (1995) 31, 32

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) 28

United States v. U.S. Gypsum Co., 333 U.S. 364 (1948) 27

Voinovich v. Quilter, 507 U.S. 146 (1993) 38, 41

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III 1, 22, 28, 33

U.S. Const. amend. XIV 49, 72

U.S. Const. amend. XV 72

STATUTES

Voting Rights Act of 1965

§ 4, 52 U.S.C. § 10303 11

§ 5, 52 U.S.C. § 10304 ..... *passim*

2011 Va. Acts Spec. Sess. I ch. 1 9

ADMINISTRATIVE MATERIALS

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7,470 (Feb. 9, 2011) 4, 65, 68

MISCELLANEOUS

Va. Dep't of Elections, Election Results for Nov. 2014, U.S. House Dist. 4, *available at* http://historical.elections.virginia.gov/elections/search/year_from:2014/year_to:2014/stage:General 21

INTRODUCTION

Eight of Virginia's eleven members of the United States House of Representatives—intervenor-defendants below—have appealed the judgment of the three-judge district court invalidating Virginia's Third Congressional District (CD3) as a racial gerrymander. After a two-day trial, the court found 2-1 that the Virginia General Assembly applied a 55%-BVAP (Black Voting Age Population) floor to increase the percentage of African-American voters in CD3, from 53.1% to 56.3%, ostensibly to obtain preclearance from the Department of Justice under § 5 of the Voting Rights Act (VRA).[1] Applying strict scrutiny, the district court concluded that a 55%-BVAP floor was not narrowly tailored to avoid retrogression in CD3, which was already a "safe" district for black voters. Although the Commonwealth defended the Enacted Plan at trial, in light of the district court's factual findings, the Commonwealth elected not to appeal.

At least one Intervenor, Representative J. Randy Forbes (R-CD4), has standing to appeal. The court's remedial plan changes his district from a "safe" incumbent seat into a competitive, majority-Democratic district. That sufficiently risks his reelection chances to give him Article III standing.

But the judgment should be affirmed. It is settled that the evidence on appeal must be viewed in the

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[1] 52 U.S.C. § 10304.

light most favorable to Plaintiffs, who prevailed at trial, and that the district court's factual findings can be set aside only for clear error. The district court did not commit clear error in finding that racial considerations predominated in drawing CD3, thereby triggering strict scrutiny. And the use of a fixed racial floor was not narrowly tailored to the goal of protecting the rights of African-American voters in CD3.

STATEMENT OF THE CASE

1. CD3 is the only majority-minority district among Virginia's eleven congressional districts. When it was created as part of Virginia's 1991 redistricting plan, CD3 had a BVAP of 61.17%.[2] DOJ precleared the plan under § 5 of the VRA in February 1992.[3]

But in 1997, a three-judge court in *Moon v. Meadows* invalidated CD3 as a racial gerrymander.[4] Applying this Court's decisions in *Shaw v. Reno* (*Shaw I*)[5] and *Miller v. Johnson*,[6] the court in *Moon* found the evidence "overwhelming that the creation of a safe black district predominated in the drawing

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[2] Joint Appendix (JA) 427 (PX-50).

[3] *Moon v. Meadows*, 952 F. Supp. 1141, 1144 (E.D. Va.), *aff'd mem.*, 521 U.S. 1113 (1997).

[4] *Id.*

[5] 509 U.S. 630 (1993) (*Shaw I*).

[6] 515 U.S. 900 (1995).

of the boundaries."[7] The "bizarre" shape and "racial characteristics" of the district supported that conclusion.[8]

In response to *Moon*, the General Assembly redrew CD3 in 1998, omitting the cities of Portsmouth and Petersburg.[9] The BVAP in revised CD3 dropped from 61.17% to 50.47%.[10] DOJ precleared that plan,[11] and CD3 was not challenged.

Following the decennial census, the General Assembly redrew Virginia's congressional districts in 2001.[12] The redistricting plan shifted a number of black voters from CD4 into CD3 and CD5.[13] As a result, the BVAP in CD3 increased to 53.1%.[14] DOJ precleared that plan,[15] and CD3 was not challenged.

2. The 2010 census revealed that CD3 was underpopulated by 63,976 citizens.[16]

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[7] 952 F. Supp. at 1145.

[8] *Id.* at 1147 (citing *Shaw I*, 509 U.S. at 646).

[9] JA 581 (Tr. 48:13-15).

[10] JA 427 (PX-50).

[11] JA 580-81 (Tr. 48:8-12).

[12] *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004).

[13] *Id.*

[14] JA 210-11 (PX-27 at 14); JA 427 (PX-50).

[15] *Hall*, 385 F.3d at 424 n.1.

[16] JA 116 (PX-13 at 12:3-8); JA 210 (PX-27 at 14); JA 590, 856 (Tr. 58:17-22, 381:23-382:2).

In advance of State redistricting under the decennial census, the DOJ, on February 9, 2011, issued its Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act.[17] The Guidance advised that "[i]n determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment."[18] Rather, the "determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district."[19]

On February 27, 2011, the General Assembly commenced a special session on redistricting.[20] The House of Delegates was controlled by Republicans, the Senate by Democrats.[21]

The sole author of what became the congressional redistricting plan at issue here was Delegate Bill Janis (R-Henrico),[22] who introduced his plan on April 6, 2011.[23] As finally approved, Janis's plan increased the total black population in CD3 from 56.8% to 59.5%, and it increased the BVAP from 53.1% to

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[17] 76 Fed. Reg. 7,470 (Feb. 9, 2011) (JA 547).

[18] *Id.* at 7,471 (JA 554).

[19] *Id.*

[20] JA 105 (PX-8 at 5).

[21] *See* JA 574 (Tr. 40:10-19).

[22] JA 568-69 (Tr. 34:6-38:6); JA 360-61 (PX-43 at 14:1-15:3).

[23] JA 107 (PX-8 at 7).

56.3%.[24] Janis's plan, among other things, returned to CD3 the City of Petersburg, which had been shifted to CD4 in response to *Moon*.[25]

On April 12, 2011, Janis described his methodology to fellow delegates, saying that he used "several criteria."[26] "First, and most importantly," the districts had "to comply with the one-person-one-vote rule."[27] Second, "the districts were drawn to conform with all mandates of federal law, and, most notably, the Voting Rights Act. The Voting Rights Act mandates that there be no retrogression in minority voter influence in the 3rd Congressional District."[28] "Third, the districts were drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections."[29] The districts were based "on the core of the existing congressional districts with the minimal amount of change or disruption to the current boundary lines, consistent with the need . . . to ensure that each district had the

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[24] JA 210 (PX-27 at 14).

[25] JA 580-81 (Tr. 47:14-48:22).

[26] JA 351 (PX-43 at 3:2).

[27] JA 351 (PX-43 at 3:3-7). As *Alabama Legislative Black Caucus v. Alabama* explained, meeting the "equal population goal" is simply a "background" requirement in any congressional redistricting, not a factor to be weighed against the use of race to determine if race predominates. 135 S. Ct. 1257, 1270 (2015).

[28] JA 351 (PX-43 at 3:16-22).

[29] JA 352 (PX-43 at 4:6-8).

right 727,365 benchmark."[30] Janis also tried to respect "the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together."[31] "Wherever possible," Janis "attempt[ed] to keep together jurisdictions and localities, counties, cities and towns."[32] He said that his plan split "fewer jurisdictions" than the benchmark plan.[33] He added that his plan "[w]herever possible . . . seeks to preserve existing local communities of interest" and in some instances to "reunite such communities" fractured in earlier plans.[34]

Janis claimed to have spoken with all of the existing congressional delegation, and that "[b]oth Republican and Democrat members provided specific detailed and significant input in recommendations to how best to draw the lines for their districts."[35] He added that "each confirmed for me and assured me that the lines for their congressional district as they appear in this legislation conform to the recommendations that they provided" and "that they support the line of their congressional district" as drawn.[36]

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[30] JA 352 (PX-43 at 4:9-14).

[31] JA 352 (PX-43 at 4:15-18).

[32] JA 352 (PX-43 at 4:21-22).

[33] JA 352 (PX-43 at 5:1-2).

[34] JA 352-53 (PX-43 at 5:8-11).

[35] JA 353 (PX-43 at 5:16-19).

[36] JA 353 (PX-43 at 6:1-6).

In response to questioning about how CD3 was drawn, however, Janis said that the single most important factor was avoiding retrogression:

> And that's how the lines were drawn, and that was the *primary focus* of how the lines . . . were drawn . . . to ensure that there be no retrogression in the 3rd Congressional District.[37]

He explained that he "was most especially focused on making sure that the 3rd Congressional District did not retrogress in its minority voting influence."[38] Non-retrogression was "one of the paramount concerns" that was "nonnegotiable."[39]

Delegate Armstrong (D-Martinsville) asked Janis whether any functional voting analysis had been conducted to determine the percentage of minority voters actually needed in CD3 for black voters to elect a candidate of choice.[40] Janis did not identify any.[41] Armstrong then argued against the plan, explaining that it "is not enough to merely look at the minority population to determine if that is a minority majority district for voting purposes. You have to conduct the voting pattern analysis in order to determine what

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[37] JA 370 (PX-43 at 25:13-16) (emphasis added).

[38] JA 361 (PX-43 at 14:24-15:1).

[39] JA 370 (PX-43 at 25:8-10).

[40] JA 359 (PX-43 at 12:23-13:6).

[41] JA 359-62 (PX-43 at 13:7-14:10, 15:9-22).

that percentage is."[42] "And when you don't do the regression analysis . . . you can crack and pack, the slang terms used to either put too many minorities in a district or too few."[43]

Nonetheless, the House of Delegates approved Janis's plan by a vote of 71 to 23.[44]

The Senate Committee on Privileges and Elections then took up the plan, and a substitute plan proposed by Senator Mamie Locke (D-Hampton). Janis repeated the opening comments he had given on the House floor.[45] In response to questioning, Janis added that, while he had solicited each congressman's views about his own proposed district, he had not solicited an opinion "from any of them as to the entire plan in its totality . . . ."[46]

Senator Creigh Deeds (D-Charlottesville) asked Janis, "Do you have any knowledge as to how this plan improves the partisan performance of those incumbents in their own district?"—to which Janis replied: "I haven't looked at the partisan performance.

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[42] JA 389 (PX-43 at 47:4-8).

[43] JA 389 (PX-43 at 47:18-22).

[44] JA 391 (PX-43 at 49:14-17).

[45] *Compare* JA 449-53 (IX-9 at 4-9) *with* JA 351-54 (PX-43 at 2-6).

[46] JA 452, 456 (IX-9 at 9:6-7, 13:23-14:2).

It was not one of the factors that I considered in the drawing of the district."[47]

The Senate adopted Locke's plan instead of Janis's plan and transmitted Locke's plan to the House.[48]

In the House, Janis argued that his plan was superior to Locke's because of the "certainty" that his plan would obtain DOJ preclearance, while the Locke plan faced "uncertainty . . . particularly because it takes the 3rd Congressional District and retrogresses it" from a "56 percent minority voting district" "to a 40 percent minority voting district."[49]

The House rejected the Locke plan[50] and the House and Senate conferees were unable to resolve the deadlock.[51] Congressional redistricting was put off until 2012.

Before the 2011 special session concluded, however, the legislature approved redistricting plans for the Virginia Senate and House of Delegates.[52] Each of the twelve majority-minority House districts had a

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[47] JA 456 (IX-9 at 14:7-13).

[48] JA 464 (IX-9 at 25:25-26:1); JA 108 (PX-8 at 8).

[49] JA 398 (PX-45 at 7:13-8:20). The "56 percent" figure apparently referenced the total black population in CD3 (56.8%) in the Benchmark Plan created in 2001. *See* JA 427 (PX-50).

[50] JA 401 (PX-45 at 11:8-9).

[51] JA 108 (PX-8 at 8).

[52] 2011 Va. Acts Spec. Sess. I ch. 1.

BVAP of at least 55%.[53] In the floor debates surrounding that plan, several members indicated that black-majority districts required a BVAP of at least 55% in order to obtain preclearance under § 5.[54]

After the November 2011 general election, Republicans continued to control the House of Delegates and also won control of the Senate. Delegate Janis did not run for reelection, but his congressional redistricting plan was reintroduced in the 2012 session.[55] The House adopted that plan by a vote of 74-21.[56]

Before the final vote, Senator Locke protested that CD3 "has been packed" with African Americans, protecting incumbents in the surrounding districts but leaving African Americans in the First, Second, and Third Congressional Districts "essentially disenfranchised."[57] Senator McEachin (D-Richmond) agreed that the plan was "packing the 3rd Congressional District and deliberately denying minority voters the opportunity to influence congressional districts elsewhere."[58] He said that the plan violated the Voting Rights Act because the black-voter concentration "is

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[53] JA 517 (IX-13 at 26).

[54] *See* JA 527 (IX-30 at 13:23-24); JA 533 (IX-32 at 18:12-16); JA 534, 536 (IX-32 at 20:8-11, 22:6-12). *See infra* at 36-37.

[55] JA 108-09 (PX-8 at 8-9).

[56] JA 109 (PX-8 at 8).

[57] JA 404 (PX-47 at 16:2-6).

[58] JA 410 (PX-47 at 23:15-18).

not necessary . . . to afford minorities the opportunity to choose a candidate of their choice."[59]

The Senate adopted the Janis plan on a vote of 20-19, and Governor McDonnell signed it into law on January 25, 2012.[60] DOJ precleared the plan in March 2012.[61]

3. On June 25, 2013, this Court, in *Shelby County v. Holder*, invalidated the coverage formula in § 4 of the VRA,[62] under which Virginia had been a covered jurisdiction that was required to seek preclearance under § 5.[63]

In October 2013, three voters in CD3 filed this action, seeking to invalidate that district as a racial gerrymander.[64] A three-judge court was convened consisting of Judge Duncan, Judge Payne, and Judge O'Grady.[65] The parties consented to intervention by Virginia's eight Republican congressmen: Robert J. Wittman (CD1), Scott Rigell (CD2), J. Randy Forbes (CD4), Robert Hurt (CD5), Bob Goodlatte (CD6), Eric Cantor (CD7), Morgan Griffith (CD9), and Frank Wolf

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[59] JA 409 (PX-47 at 22:13-16).

[60] JA 109 (PX-8 at 9), 412 (PX-47 at 25:16).

[61] Jurisdictional Statement (JS) 10a.

[62] 52 U.S.C. § 10303.

[63] 133 S. Ct. 2612, 2631 (2013).

[64] JS 3a-4a.

[65] Order (Oct. 21, 2013), ECF No. 10.

(CD10).[66] Virginia's three Democratic congressmen did not intervene.

The district court denied motions for summary judgment, finding "genuine disputes of material fact,"[67] and conducted a two-day trial in May 2014.

The trial record consisted of the parties' documentary exhibits and the live testimony of two experts. Michael McDonald was qualified as an expert for Plaintiffs in the field of political science.[68] His expert reports were received into evidence[69] and he testified at length about his finding that race predominated in drawing CD3.[70] McDonald also testified about a hypothetical "Alternative Plan"[71] that the legislature could have adopted. The Alternative Plan had a BVAP in CD3 of 50.2%[72] and would have improved performance with regard to traditional redistricting principles, including compactness, contiguity, and reducing splits in localities and precincts.[73]

On cross-examination, McDonald acknowledged that the Alternative Plan would have changed CD2

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[66] Order (Dec. 3, 2013), ECF No. 26.

[67] Order (Jan. 27, 2014), ECF No. 50.

[68] JA 562 (Tr. 27:3-6).

[69] JA 175-296 (PX-26 to PX-30).

[70] JA 560-745 (Tr. 25-239).

[71] JA 631-39 (Tr. 107-17); *see* JA 257-73 (PX-29) (analysis); JA 424-26 (PX-49) (maps).

[72] JA 673 (Tr. 157:13-18); JA 257, 268 (PX-29 at 1, 8).

[73] JA 632-39 (Tr. 109-17).

from a "50 percent toss-up district" to a 55% Democratic district, which might reduce Republican dominance in Virginia's congressional delegation from 8-3 to 7-4.[74] The defense also sought to show that the Alternative Plan did not maintain the core of the district as well as Enacted CD3.[75]

The defense also attacked McDonald's credibility by showing that he had written a law review article, before his engagement, opining that the purpose of the 2012 plan was "to create an 8-3 Republican majority."[76] McDonald explained at trial, however, that he had not analyzed the use of race in redrawing CD3 when he had written that article.[77]

The defense offered John Morgan as their only witness. He was qualified as an expert in demography and redistricting.[78] Morgan testified that the creation of CD3 was explainable by politics and incumbency protection.[79] Morgan admitted on cross-examination, however, that he had made mistakes in his quantitative analysis.[80] Although he corrected some of those errors before trial, more were brought

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[74] JA 697 (Tr. 184:15-19).

[75] JA 515-16 (IX-27); JA 889 (Tr. 422:18-21).

[76] JA 649-50 (Tr. 129:3-25).

[77] JA 566-67, 733 (Tr. 32:7-11, 226:4-21).

[78] JA 746 (Tr. 241:18-23).

[79] JA 751 (Tr. 247:2-11).

[80] JA 836-43 (Tr. 359-66).

out during cross-examination.[81] Morgan insisted that those mistakes did not affect his opinion.[82]

There was conflicting evidence about whether the General Assembly applied a 55%-BVAP floor in drawing CD3. Morgan, who helped the Republican members redraw the House of Delegates districts in the same special session,[83] opined in his expert report that the General Assembly could reasonably believe that a 55%-BVAP floor was needed to obtain preclearance from DOJ.[84] He said that the black-majority House districts all exceeded 55% BVAP and that several alternatives under 55% were not adopted.[85] At trial, however, Morgan denied having personal knowledge that legislators had applied a 55%-BVAP floor.[86]

As further proof that a racial floor was used, Plaintiffs pointed to various statements by legislators about the need for a 55%-BVAP floor.[87] In addition, Virginia's § 5 submission touted the 56% BVAP of Enacted CD3 as being "over 55 percent,"[88] comparing it

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[81] JA 841 (Tr. 365:3-10).

[82] JA 864-65 (Tr. 392:3-24).

[83] JA 747 (Tr. 242:17-25).

[84] JA 829-31 (Tr. 351:20-353:8); JA 517-18 (IX-13 at 26-27).

[85] JA 808-09 (Tr. 327:14-328:23); JA 517-18 (IX-13 at 26-27).

[86] JA 809-10 (Tr. 328:24-330:1).

[87] JA 397-98 (PX-45 at 7-8); JA 527 (IX-30 at 13-14); JA 533, 534, 536 (IX-32 at 18, 20, 22).

[88] JA 77 (PX-1 at 41).

to other proposed plans that would have resulted in a BVAP "below 55 percent."[89]

4. By a 2-1 vote, the district court found that CD3 was an unconstitutional racial gerrymander and enjoined Virginia from conducting any further congressional elections under the 2012 plan.[90] Intervenors alone appealed. After this Court decided *Alabama*, the Court vacated the judgment in this case and remanded for further consideration in light of that decision.[91]

On remand, the district court again found 2-1 that CD3 was unconstitutional. Writing for the majority, Judge Duncan explained that the "legislative record here is replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan."[92] The court also concluded that the legislature had used "a 55% BVAP floor" in redrawing CD3.[93]

The majority found McDonald's testimony credible. It rejected the defense claim that McDonald's analysis was discredited by his earlier law review article, written before he had analyzed the use of

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[89] JA 78, 79 (PX-1 at 42, 43).

[90] *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 554-55 (E.D. Va. 2014), *vacated and remanded sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

[91] *Cantor*, 135 S. Ct. at 1699.

[92] JS 18a.

[93] JS 20a-21a.

race.[94] The majority also discounted Morgan's testimony, pointing out his weak credentials, his failure to perform a racial bloc voting analysis, and his mistakes in analyzing population swaps.[95]

Finding that racial considerations predominated, the court applied strict scrutiny, concluding that, while complying with § 5 was a compelling state interest, the use of race was not narrowly tailored to avoid retrogression in CD3.[96] "[T]he 2012 Plan was not informed by a racial bloc voting or other, similar type of analysis."[97] The General Assembly also increased the BVAP in CD3 from 53.1% to 56.3%, despite that Congressman Bobby Scott, "a Democrat supported by the majority of African-American voters," had been repeatedly reelected by large margins.[98] Indeed, under Enacted CD3, Scott won reelection in 2012 "by an even larger margin, receiving 81.3% of the vote."[99]

The court enjoined any further elections under the 2012 plan and gave the legislature until September 1, 2015 to revise it.[100] The court said that Virginians in the "Third Congressional District whose

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[94] JS 21a-22a n.16.

[95] *Id.*

[96] JS 36a-38a.

[97] JS 9a; *see also* JS 21a.

[98] JS 40a.

[99] JS 40a; *see* JA 205 (PX-27 at 11).

[100] JS 94a.

constitutional rights have been injured by improper racial gerrymandering have suffered significant harm" and "'are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan.'"[101]

Judge Payne dissented. He rejected McDonald's testimony,[102] concluding that "McDonald's views, in whole and in its constituent parts, are not entitled to any credibility."[103] Judge Payne believed Morgan's testimony instead.[104] Judge Payne also concluded that statements by Delegate Janis about the importance of nonretrogression in CD3 failed to prove that race was the predominant factor in the redistricting.[105]

Judge Payne also was not persuaded that the legislature had imposed a 55%-BVAP floor in redrawing CD3, calling Plaintiffs' evidence "a patchwork quilt."[106] (In a later-tried case, however, involving a challenge to the House districts, Judge Payne concluded "that the 55% BVAP figure *was used* in structuring the districts and in assessing whether the

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[101] JS 43a (quoting *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981)).

[102] JS 48a-53a.

[103] JS 53a.

[104] JS 83a-85a.

[105] JS 62a.

[106] JS 66a-67a.

redistricting plan satisfied constitutional standards and the VRA . . . ."[107]).

Intervenors noted a timely appeal to this Court.

5. While the appeal was pending here, the remedial phase proceeded in the district court. The General Assembly convened in special session on August 17, 2015, but the Senate adjourned without agreement on a plan. After the September 1 deadline passed, the district court invited the parties and any interested non-parties to propose plans. Remedial plans were submitted by, among others, Plaintiffs, Intervenors, the NAACP, and the Governor of Virginia. The court appointed Dr. Bernard Grofman as special master.[108]

On November 16, 2015, the Special Master filed his report, rejecting all of the proposed submissions and recommending two remedial plans of his own. He found "the obvious way to remedy the constitutional violation in CD3 is to redraw CD3 as a Newport

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[107] *Bethune-Hill v. Va. State Bd. of Elections*, 2015 WL 6440332, at *9, 2015 U.S. Dist. LEXIS 144511, at *27 (E.D. Va. Oct. 22, 2015) (emphasis added), *jurisdictional statement docketed*, No. 15-680. *See also id.* at *41, 2015 U.S. Dist. LEXIS 144511, at *120 ("[T]he Court finds that a 55% BVAP floor was employed by Delegate Jones and the other legislators who had a hand in crafting the Challenged Districts. Those delegates believed this necessary to avoid retrogression under federal law, and we do not doubt the sincerity of their belief."). The court was unanimous on that point. *See id.* at *63, 2015 U.S. Dist. LEXIS 144511, at *186 (Keenan, J., dissenting).

[108] Mem. Op. at 1-3, ECF No. 299.

News-Hampton-Portsmouth-Norfolk based district that is contiguous, highly compact, and has few city splits."[109] His revisions were based on traditional redistricting considerations, not race.[110] The Special Master explained that his was a "least change" approach, making the minimal changes necessary to CD3 to correct the constitutional violation and limiting the effect of those changes to the immediately adjoining districts, CDs 1, 2, 4, and 7.[111]

The Special Master concluded that neither of his plans would impair the ability of African American voters in CD3 to elect a candidate of choice.[112] The BVAP scores in CD3 under his two proposals exceeded 42%.[113] He credited an expert report from Dr. Lisa Handley,[114] which concluded that, because of significant white-crossover voting, a BVAP in CD3 of 30-34% was sufficient to enable black voters to elect a candidate of choice.[115] Accordingly, the Special Master

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[109] Report of the Special Master at 21, ECF No. 272 (SM Report).

[110] *Id.* at 3, 4, 9, 11, 15, 16.

[111] *Id.* at 19-25.

[112] *Id.* at 37.

[113] *Id.* at 45.

[114] *Id.* at 38-41, 63.

[115] *See* Dr. Lisa Handley, *Providing Black Voters with an Opportunity to Elect Candidates of Choice: A District-Specific Functional Analysis of the Third Congressional District in Virginia* at 16 (Sept. 17, 2015), ECF No. 231-3, *available at* http://redistricting.dls.virginia.gov/2010/Data/Court%20Ordered%20Redistricting/Governor.zip ("[E]ven a district that is as low as 30 to 34% black

(Continued on following page)

concluded that a district "somewhat above a 40%" BVAP would not retrogress.[116]

After conducting a hearing on December 14, 2015, the district court, on January 7, 2016, denied Intervenors' motion for a stay pending appeal and ordered Virginia election officials (as they had requested) to implement the Special Master's proposed remedial plan (Plan 16) for the 2016 election cycle.[117] The district court found that the remedial plan cured the racial gerrymander by redrawing CD3 according to "neutral goals of compactness, contiguity, and avoiding unnecessary city or county splits, rather than any racial considerations."[118] The court also found that the plan complied with the VRA. Because of significant white-crossover voting, the 45.3% BVAP of the remedial plan preserved "African-American voters' ability to elect the representative of their choice."[119]

After CD3, CD4 is the district next most affected by the remedial plan. The BVAP in CD4 increases from 31.3% to 40.9%.[120] The Special Master observed that the higher BVAP creates a "realistic opportunity"

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in voting age population can provide black voters with an opportunity to elect their preferred candidates to represent the Third Congressional District.").

[116] SM Report at 37.

[117] Mem. Op., ECF No. 299; Order, ECF No. 300.

[118] Mem. Op. at 17, ECF No. 299.

[119] *Id.*

[120] *Id.* at 25; Supplemental Comments to the Report by the Special Master at 52, ECF No. 294 (SM Supp.).

for a candidate of choice of African-American voters to win election there.[121] Democratic performance (measured by the election results for the 2012 Presidential election) would also increase from 48.8% to 60.9%.[122] The Special Master made clear that he did not set out to increase the BVAP in CD4 or to make it more Democratic; that was simply the byproduct of revising CD3 using traditional redistricting principles.[123]

It is not clear if the increase in Democratic performance in CD4 will cause Representative Forbes to lose reelection in 2016. Forbes defeated his Democratic challenger in 2014 by a vote of 60.1% to 37.5%.[124] The Special Master noted, however, that revised CD4 will be a "competitive" district where it is now "a safe seat for the Republican incumbent."[125]

SUMMARY OF ARGUMENT

1. Representative Forbes has standing to appeal. The court-ordered remedy transforms CD4 into a majority-Democratic district, where before it was

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[121] SM Report at 55-56.

[122] *Id.*

[123] *Id.* at 4, 15-16, 42. *See also* SM Supp. at 8.

[124] *See* Va. Dep't of Elections, Election Results for Nov. 2014, U.S. House Dist. 4, *available at* http://historical.elections.virginia.gov/elections/search/year_from:2014/year_to:2014/stage:General.

[125] SM Supp. at 11.

a "safe" seat for Forbes. Although that change does not guarantee that Forbes will lose his reelection bid, it impairs his reelection opportunity sufficiently to satisfy the injury-in-fact requirement that this Court has applied in previous cases.

Plaintiffs conflate the standing of a voter to bring a racial gerrymandering claim with the standing of an intervenor-defendant who claims direct and unique injury as the result of the required remedy. The injury imposed by the remedy does not go away simply because the intervenor himself could not have brought the same gerrymandering claim as Plaintiffs. When, as here, the required remedy imposes direct injury on the intervenor in a manner that satisfies Article III, the intervenor has standing to appeal the judgment.

2. Although the appeal is justiciable, the Court should affirm. Intervenors offer the same view of the evidence that they (and we) argued at trial. But the facts must now be taken in the light most favorable to Plaintiffs, and the district court's findings cannot be set aside unless clearly erroneous. Under that standard, Intervenors cannot prevail.

Substantial evidence supports the district court's finding on a crucial fact: the legislature applied a 55%-BVAP floor to increase the percentage of black voters in CD3. Indeed, Intervenors' own expert opined that the legislature employed that racial target. The 55%-BVAP floor was also corroborated by Janis's floor statements, by Virginia's § 5 submission, and by the

floor statements of other legislators in contemporaneous debates involving the House districts. Janis also insisted that the higher BVAP percentage was needed to obtain DOJ preclearance under § 5, and that avoiding retrogression was the "primary," "paramount," and "nonnegotiable" concern in drawing CD3.

The 55%-BVAP floor caused the legislature to move thousands of black voters into CD3. Race thus determined *which* voters were moved. And contrary to Judge Payne's understanding that no legislator had complained about race-based redistricting, two Senators explicitly called out what was happening at the time as racial "packing" that would dilute the vote of African Americans.

Because direct evidence supported the finding of racial predominance, circumstantial evidence was unnecessary. But there was that too. CD3 is bizarrely shaped, the least compact of all eleven districts, and the district with the most locality and VTD splits. And the population swaps needed to increase the BVAP in CD3 disproportionately affected black voters.

Intervenors (and their amici, Alabama and Texas) are wrong that strict scrutiny does not apply unless race "actually conflicts" with traditional redistricting considerations. The Court rejected any such requirement in *Miller*, *Bush v. Vera*,[126] and *Shaw v. Hunt* (*Shaw II*).[127] The Court instead looks at whether

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[126] 517 U.S. 952 (1996).

[127] 517 U.S. 899 (1996).

racial considerations predominated in the hierarchy of factors by having a qualitatively greater influence, thereby subordinating other considerations.

Intervenors are likewise wrong that a fixed racial quota should not trigger strict scrutiny as long as politics could have led to the same outcome. Strict scrutiny applies if a State uses race as a "proxy" to pack black voters into a district for political reasons. It likewise applies if the State uses race as the excuse to do the same thing.

In any case, Intervenors' political explanation for CD3—that the legislature simply was trying to entrench an 8-3 partisan split favoring Republicans—was rejected by the majority of the district court. That finding was not clearly erroneous because Janis expressly disclaimed any such partisan intent.

The extensive direct evidence that race predominated distinguishes this case from *Easley v. Cromartie*, where the strongest evidence of racial predominance was a single legislator's comment that the plan represented "a fair, geographic, racial and partisan balance throughout the State of North Carolina."[128] The evidence of racial predominance here—intentionally maintaining a black-majority district by increasing its BVAP above a 55% floor—is even stronger than the direct evidence found sufficient in *Miller*, *Bush*, and *Shaw II*, cases that *Easley* cited as models.

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[128] 532 U.S. 234, 253 (2001).

Given the direct evidence that race predominated, Intervenors are wrong that Plaintiffs also had to introduce an alternative plan to show how the districts could have been drawn with greater racial balance while respecting the legislature's policy choices. Plaintiffs *did* introduce an alternative plan to prove just that. But they did not need to. An alternative plan can be useful in the absence of direct evidence to show, circumstantially, that race predominated. That the legislature *could* have accomplished its objectives without relying so much on race helps prove that it *did* rely too much on race. But circumstantial evidence is unnecessary when, as here, direct evidence proves the point better than anything else.

3. In light of its factual findings, which are supported by substantial evidence, the district court did not err in holding that the legislature's use of a racial floor was not narrowly tailored to serve a compelling governmental interest. As a matter of law, the requirement under § 5 to avoid retrogression did not compel Virginia to freeze the percentage of black voters in CD3, let alone to raise it above 55%. This Court's precedents had made that point clear years before.

There was also no evidence to support a reasonable belief that DOJ required a 55%-BVAP floor as a condition of preclearance. DOJ disclaimed any such requirement in its Guidance in February 2011, weeks before Janis even introduced his plan. In addition, CD3 had been precleared in the past with lower BVAP scores. DOJ also precleared a number of Virginia

Senate districts in 2011, the year before the congressional plan was finally adopted, with BVAP scores under 55%.

The defense also offered no evidence to carry its burden of proving that a 55%-BVAP floor was needed to obtain preclearance under § 5. Morgan, the only defense witness, disclaimed any opinion on the narrow-tailoring question. That admission was fatal. And the gap in the defense case could not be filled by attacking Plaintiffs' Alternative Plan. The Alternative Plan showed how the districts could have been revised to meet the legislature's stated redistricting goals without relying on race to the same extent as the Enacted Plan. So it showed the absence of narrow tailoring. More importantly, since the defense bore the burden to prove narrow tailoring, attacking someone else's plan was not enough. Intervenors failed to show that the government needed to use a mechanical racial floor to protect minority voting rights.

ARGUMENT

As the district court recognized in denying summary judgment,[129] the parties disputed whether race predominated when the General Assembly redrew CD3. We joined with Intervenors at trial to defend the Enacted Plan. Had the majority viewed the

[129] Order (Jan. 27, 2014), ECF No. 50.

evidence as we argued, CD3 was not unconstitutional. But the majority did not see it that way.

This Court may not reverse simply because it "would have decided the case differently."[130] The district court's findings are reviewed "only for 'clear error.'"[131] Under the "clearly erroneous" standard, the question is "whether 'on the entire evidence,' [the Court] is 'left with the definite and firm conviction that a mistake has been committed.'"[132] Because that demanding standard cannot be satisfied, the State defendants did not appeal.[133]

Although Representative Forbes has standing to appeal, the Court should affirm. The evidence, taken in the "light most favorable" to Plaintiffs,[134] supports the majority's finding that race predominated, thereby triggering strict scrutiny. And because the 55%-BVAP floor was not needed to protect minority voting

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[130] *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

[131] *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

[132] *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[133] In noting that the current Attorney General of Virginia, Mark R. Herring, did not appeal, Judge Payne mistakenly thought that the previous Attorney General, a Republican, was the one whose office defended the plan at trial. *See* Mem. Op. at 37 n.17, ECF No. 299; JS 45a n.30. General Herring was inaugurated in January 2014, and his office defended the plan alongside Intervenors at the May 2014 trial.

[134] *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993).

rights, the district court properly invalidated CD3 as racially gerrymandered.

I. Representative Forbes has standing to appeal.

Article III's standing requirement must be met "'by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'"[135] The appeal is justiciable as long as one of the appellants has standing.[136] To have standing, an appellant "must seek relief for an injury that affects him in a 'personal and individual way.'"[137] The injury-in-fact requirement "distinguishes 'a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.'"[138]

When Intervenors filed their opening brief, the district court had not yet selected a remedial plan for CD3, although all of the proposed plans then pending

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[135] *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

[136] *E.g.*, *Horne v. Flores*, 557 U.S. 433, 446 (2009); *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

[137] *Hollingsworth*, 133 S. Ct. at 2662 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

[138] *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)).

would have made "at least one Republican district majority-Democratic."[139] On January 7, 2016, however, the district court implemented the Special Master's Plan 16. That plan has the effect of increasing the Democratic vote share in Forbes's CD4 from 48.8% to 60.9%.[140]

The Special Master acknowledged that the remedial plan will make Forbes's 2016 election in CD4 "closely contested"[141] where it is now a "safe seat."[142] That constitutes a direct, personal injury to Forbes that is "fairly traceable" to the judgment from which he has appealed and that would be "redressable by a favorable ruling" should Forbes prevail.[143]

This Court has repeatedly held that candidates have standing to challenge governmental actions that impair their election opportunity. *Davis v. FEC* held that a congressional candidate had standing to challenge asymmetrical campaign-finance restrictions that burdened his candidacy.[144] *Storer v. Brown* held that candidates had "ample standing" to challenge restrictive ballot-access requirements.[145] And the standing

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[139] Appellants' Br. at 58.

[140] SM Report at 55-56.

[141] *Id.* at 55.

[142] SM Supp. at 11.

[143] *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)).

[144] 554 U.S. 724, 731-73 (2008).

[145] 415 U.S. 724, 738 n.9 (1974).

of the presidential contenders in *Bush v. Gore* was so obvious that it went unmentioned.[146]

Even in a case not involving election-law issues, the Court in *Meese v. Keene*[147] recognized impaired reelection chances as the basis for standing. Keene, a film exhibitor and a member of the California Senate, had standing to challenge the constitutionality of a federal statute that branded the films he wanted to show as "political propaganda." The pejorative label "would *substantially harm his chances for reelection* and would adversely affect his reputation in the community."[148] Keene could not show the films without risking "an impairment of his *political career*"[149] and substantial detriment to his "reputation and *candidacy*."[150]

Just as in those cases, the injury-in-fact requirement is satisfied here because remedying CD3 will necessarily make Forbes's CD4 a majority-Democratic district, posing a material "'obstacle to [Forbes's] candidacy.'"[151] That obstacle is a direct, concrete injury to Forbes, not some "undifferentiated, generalized

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[146] 531 U.S. 98 (2000).

[147] 481 U.S. 465 (1987).

[148] *Id.* at 474 (emphasis added).

[149] *Id.* at 475 (emphasis added).

[150] *Id.* (emphasis added).

[151] *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 665 (1993) (quoting *Clements v. Fashing*, 457 U.S. 957, 962 (1982)) (emphasis altered).

grievance about the conduct of government" shared by the public at large.[152]

To be sure, Forbes may still be reelected, and he has failed to show the likelihood of irreparable harm.[153] But that is not the measure of justiciable injury. A non-incumbent who challenges an election restriction does not have to prove that he "would actually have been elected" but for the restriction.[154] An incumbent likewise need not prove his certain defeat as a condition of challenging a substantial obstacle to reelection.

Plaintiffs confuse the standing of a voter to challenge a racially gerrymandered district in the first instance with the standing of an intervenor-defendant to appeal an adverse judgment that directly and adversely affects his interests.[155] It is true that, under *United States v. Hays*[156] and *Sinkfield v. Kelley*,[157] Intervenors would not have had standing in their capacity as *voters* in adjoining districts to challenge CD3, or to complain about the impact on their own districts were CD3 redrawn. When a voter does

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[152] *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

[153] *See* VSBE Opp. to Intervenor-Defs.' Stay Appl. at 29-30.

[154] *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 665.

[155] Supp. Br. for Appellees Gloria Personhuballah and James Farkas on Standing at 8-10.

[156] 515 U.S. 737 (1995).

[157] 531 U.S. 28 (2000) (per curiam).

not live in the gerrymandered district, "any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference."[158] The rule is the same when the voter lives in an adjacent district that was "necessarily influenced by the shapes of the majority-minority districts upon which they border."[159]

But a plaintiff's standing to sue is different from that of a defendant or intervenor to appeal an adverse judgment. Thus, in *ASARCO Inc. v. Kadish*,[160] the Court held that the intervenor-defendants had standing to seek review of the judgment of the Arizona Supreme Court that invalidated, as preempted by federal law, an Arizona statute under which they held State-mineral leases. "[A]s a result of the state-court judgment, the case ha[d] taken on such definite shape that they [were] under a defined and specific legal obligation, one which causes them direct injury."[161]

Representative Forbes is in the same position here. Because the remedy required by the judgment jeopardizes his reelection opportunity, Forbes "is not merely an undifferentiated bystander with claims

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[158] *Hays*, 515 U.S. at 745.

[159] *Sinkfield*, 531 U.S. at 30.

[160] 490 U.S. 605 (1989).

[161] *Id.* at 618.

indistinguishable from those of the general public."[162] So his appeal is justiciable.

II. The district court did not commit clear error in finding that race was the predominant factor in drawing CD3.

A. Substantial evidence supported the majority's finding that race predominated.

1. There was sufficient direct evidence of a 55%-BVAP floor.

Substantial evidence supported the district court's conclusion that the General Assembly applied a 55%-BVAP floor when it concentrated black voters in CD3, evidence that Intervenors do not even mention in their statement of facts. Morgan was the Republican consultant for the House of Delegates redistricting plan during the 2011 special session. In a sworn[163] expert report, Morgan explained why he concluded that a 55%-BVAP floor was used for the congressional plan:

> [T]he General Assembly enacted, with strong support of bipartisan and black legislators, a House of Delegates redistricting plan with a 55% [BVAP] *as the floor for black-majority*

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[162] *Meese*, 481 U.S. at 476. Once a litigant has standing, Article III does not restrict the legal arguments that may be asserted to win relief. *Bond v. United States*, 131 S. Ct. 2355, 2361-62 (2011).

[163] JA 520 (IX-13 at 28).

> *districts* . . . including districts within the geography covered by Congressional District 3. The General Assembly . . . had ample reason to believe that legislators of both parties, including black legislators, viewed the 55% [BVAP] for the House of Delegates districts as appropriate to obtain Section 5 preclearance, even if it meant raising the [BVAP] above the levels in the benchmark plan. *The General Assembly acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the District 3 [BVAP] at 56.3%.*[164]

Although Morgan tried to walk back his admission at trial, saying that he lacked *personal* knowledge of any 55%-BVAP floor,[165] the majority did not commit clear error in relying on the prior admission in the expert report that Intervenors themselves offered into evidence.[166]

Morgan's conclusion that the General Assembly acted in accordance with a 55%-BVAP floor was supported by other evidence. Statements in a § 5 submission may constitute "direct evidence of the legislature's objective."[167] In this case, Virginia's § 5 submission advocated the 56.3% BVAP of Enacted

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[164] JA 518 (IX-13 at 26-27) (emphasis added); JA 829-30 (Tr. 351:20-352:25).

[165] JA 809-11 (Tr. 328:24-330:25).

[166] JS 20a-21a; JA 518 (IX-13 at 26-27).

[167] *E.g.*, *Bush v. Vera*, 517 U.S. 952, 960 (1996) (plurality); *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (*Shaw II*).

CD3 as being "over 55 percent,"[168] comparing it to other alternative plans that would have resulted in a BVAP "below 55 percent."[169]

Admissions by the plan's draftsman may also constitute "direct evidence" of racial motivation.[170] In this case, Delegate Janis indicated that his principal objective in drawing the lines was not only to preserve the same BVAP in CD3 but to increase it above a 55% threshold. Janis said he was "mindful that the [V]oting [R]ights [A]ct requires us not to retrogress that district," so "under the new proposed lines, *we can have no less than percentages that we have under the existing lines* . . . ."[171] Insisting that § 5 prevents any reduction in the existing BVAP is the same legal mistake called out in *Alabama* as "strong, perhaps overwhelming evidence" that race predominated there: "that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible."[172]

Yet Janis sought not only to maintain the BVAP in CD3 but to materially augment it. One delegate questioned Janis about the 55% target: "[I]s there any empirical evidence whatsoever that 55 percent

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[168] JA 77 (PX-1 at 41).

[169] JA 78-79 (PX-1 at 42-43).

[170] *E.g.*, *Shaw II*, 517 U.S. at 906.

[171] JA 119-20 (PX-13 at 8:17-21) (emphasis added).

[172] *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015).

African-American voting population is different than 51 percent or 50? Or is it just a number that has been pulled out of the air?"[173] Janis responded that it made getting § 5 preclearance a "certainty," whereas the 40% BVAP in Senator Locke's competing plan jeopardized preclearance.[174]

Plaintiffs also introduced the floor debates addressing the redistricting plan for the House districts—occurring in the same special session—that reflected the same mistaken belief that a 55%-BVAP floor was needed for DOJ preclearance. Delegate Dance explained that populations were shifted among three black-majority districts to get "at least 55 percent performing."[175] And Senator Vogel (who later sponsored Janis's plan in the Senate[176]) left no doubt about the need for a 55% floor:

> [W]hen it came to Section 5—I just want to be very clear about this—that we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0.[177]

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[173] JA 397 (PX-45 at 7:9-12).

[174] JA 398-99 (PX-45 at 7:13-8:20).

[175] JA 527 (IX-30 at 13:23-25).

[176] JA 108 (PX-8 at 8).

[177] JA 533 (IX-32 at 18:11-16).

> We were just simply following what, I believe, is not subject to any question; that is, as of today, the lowest percentage that the Department of Justice has ever approved is 55.0.[178]
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> * * *
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> [I]t has been the position of the Department of Justice, and I will speak to this very confidently, that 55.0 is the percentage that they believe is what is qualified, and that has been, at least in the past to date, their position regarding what it would take to be able to elect a candidate of your choice, whomever that might be.[179]

Objecting to the use of a mechanical racial target in the congressional redistricting plan, Delegate Armstrong found it "clear" that there was a "pattern" in light of how the majority-minority House districts had been structured.[180]

That the 55%-BVAP floor predominated in revising CD3 was further supported by Janis's insistence that nonretrogression was his "primary focus"[181] and the "paramount,"[182] "nonnegotiable"[183] concern. We

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[178] JA 534 (IX-32 at 20:8-11).

[179] JA 536 (IX-32 at 22:6-12).

[180] JA 389, 390 (PX-43 at 47:1-8, 48:7-9).

[181] JA 370 (PX-43 at 25:14).

[182] JA 370 (PX-43 at 25:8).

[183] JA 370 (PX-43 at 25:10).

agree with Intervenors that general statements about the need to comply with federal law, including the Voting Rights Act, should not suffice, standing alone, to prove that racial considerations predominated.[184] But in this case, the insistence that nonretrogression was paramount was joined with the claim that a 55%-BVAP floor was the means for avoiding retrogression. That made race the predominant factor.

2. The 55%-BVAP floor led the legislature to move a significant number of African Americans into CD3.

Alabama explained that race predominates when the legislature "'place[s]' race 'above traditional districting considerations in determining *which* persons were placed in appropriately apportioned districts.'"[185]

> In other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as

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[184] *See Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) ("preference for federal over state law when . . . the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution").

[185] 135 S. Ct. at 1271 (quoting United States Amicus Br. at 19) (emphasis altered).

> opposed to other, 'traditional' factors when doing so.[186]

The evidence found by the district court met that test. The black population of CD3 was intentionally increased to raise the BVAP score from 53.1% to 56.3%, to ensure compliance with the 55%-BVAP floor supposedly needed for preclearance.[187] The actual population swaps confirmed that a racial floor had been applied; three times the number of people were moved in and out of CD3 than needed to equalize the population, and the moves were overwhelmingly race-based.[188] Thus, contrary to Intervenors' claim, core-preservation concerns did not predominate over race in determining "which" people to move into CD3; the 55%-BVAP floor demanded black voters. And as *Alabama* shows, core preservation does not predominate when, as here, it "is not directly relevant to the origin of the *new* district inhabitants."[189]

3. Intervenors wrongly claim that there was no evidence of "packing."

In his dissent, Judge Payne mistakenly discounted Plaintiffs' evidence of racial packing because he incorrectly believed that no legislator had actually

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[186] *Id.*

[187] JA 395-96, 397-99 (PX-45 at 4:15-5:15, 7:6-8:20); JA 427 (PX-50).

[188] JS 30a (citations omitted).

[189] 135 S. Ct. at 1271.

complained about it: "[n]otwithstanding the fact that these opponents of the Enacted Plan had every reason to characterize the Enacted Plan in the harshest terms possible (i.e., as race driven or as the product of a racial quota), they did not do so."[190] Intervenors repeat that mistake in their opening brief.[191]

In fact, Senator Locke rose to condemn the Enacted Plan on the ground that CD3 "has been packed" with black voters, warning that "those African-Americans living in the 1st, 2nd, and 4th congressional districts that abut the 3rd are essentially disenfranchised."[192] And Senator McEachin likewise characterized the plan as "packing" black people into "a single congressional district, more than what is necessary to elect a candidate of choice," thereby "depriving minorities of their ability to influence elections elsewhere."[193]

Intervenors similarly misstate the record when they claim that Plaintiffs' expert supposedly "conceded at trial" that "packing does not exist" in CD3.[194] Intervenors quote McDonald out of context. In fact, McDonald testified unequivocally that more black voters were moved into CD3 than needed to protect

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[190] JS 69a (Payne, J., dissenting).

[191] Appellants' Br. at 6.

[192] JA 404 (PX-47 at 16:2-6).

[193] JA 409 (PX-47 at 22:3-10).

[194] Appellants' Br. at 13.

their ability to elect a candidate of choice.[195] To McDonald, however, "packing" meant placing *so* many black voters in one district as to deny other black voters the ability to have a *second* black-majority district; in *that* sense, he said, CD3 was not "packed."[196] But that atypical notion of packing is different from common usage. As Justice White said in *Shaw v. Reno* (*Shaw I*), "the purposeful creation of a majority-minority district could have discriminatory effect if it is achieved by means of '*packing*'—i.e., *overconcentration* of minority voters."[197] *Alabama* used the same formulation in saying that a "racial gerrymander" occurs "when the State adds more minority voters than needed for a minority group to elect a candidate of its choice."[198]

The district court had ample evidence to find that "packing" created precisely that type of "racial gerrymander" here.

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[195] JA 715 (Tr. 204:23-24).

[196] JA 716 (Tr. 205:9-22).

[197] 509 U.S. at 670 (White, J., dissenting) (emphasis added). *See also Voinovich*, 507 U.S. at 154 ("'[Dilution of racial minority group voting strength may be caused' either 'by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.'") (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)).

[198] 135 S. Ct. at 1263.

4. Plaintiffs' circumstantial evidence corroborated their direct evidence.

Although the direct evidence sufficed, Plaintiffs also adduced significant circumstantial evidence to corroborate that race predominated in drawing CD3. McDonald testified:

- "The district is bizarrely shaped. It stretches from Richmond to Norfolk skipping back and forth across the James River mostly to capture predominantly African-American communities."[199] In Norfolk, for example, "it wraps around a small—three predominantly white precincts that are not connected to the Second District via bridge or anything else. They are only connected by water."[200]
- Enacted CD3 is the least compact of Virginia's 11 congressional districts.[201]
- It relies on contiguity by water, not land, in an apparent effort to connect pockets of black voters and to "bypass" white voters.[202]
- It splits more localities and VTDs than any other district.[203]

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[199] JA 575 (Tr. 42:13-16).

[200] JA 576 (Tr. 43:8-11); *see also* JA 191-92 (PX-27 at 3-5) (maps).

[201] JA 603 (Tr. 74:5-13).

[202] JA 603-04 (Tr. 74:18-76:9).

[203] JA 605-07 (Tr. 76:10-79:3); JA 201 (PX-27 at 10).

- And although Benchmark CD3 was underpopulated by 63,976, 180,000 people were moved between districts to net the number required,[204] and the percentage of black voters moved into CD3 was disproportionately high compared to voters moved out of CD3.[205] Indeed, several highly Democratic-performing but largely white VTDs that could have been included in CD3 were left out in favor of denser black VTDs.[206]

B. Racial floors trigger strict scrutiny even if used for political gerrymandering.

Intervenors are mistaken when they say that race not only must predominate over traditional redistricting considerations before strict scrutiny applies, but that race must *actually conflict* with traditional factors.[207] They cite Judge Payne as the only legal authority for that argument.[208]

But this Court has never imposed an actual-conflict requirement. *Alabama* did not require a

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[204] JA 614 (Tr. 87:3-16).

[205] JA 611-14 (Tr. 83:25-87:6).

[206] JA 616 (Tr. 89:6-23).

[207] Appellants' Br. at 25.

[208] JS 64a (Payne, J., dissenting) ("But I read the Supreme Court's precedent as demanding *actual* conflict between traditional redistricting criteria and race . . . ."); *see also Bethune-Hill*, 2015 WL 6440332, at *15, 2015 U.S. Dist. LEXIS 144511, at *43-44 (Payne, J.) (same, citing his dissenting opinion in *Page*).

finding that race *conflicted* with traditional factors, only that "the legislature 'placed' race '*above* traditional districting considerations in determining *which* persons'" to move.[209] *Miller v. Johnson* effectively rejected an actual-conflict requirement when the Court said that a plaintiff does not have to prove that the "district's shape is so bizarre that it is unexplainable other than on the basis of race."[210] The essence of the constitutional violation is when the "State has used race as a basis for separating voters into districts."[211] Bizarreness of shape may be "circumstantial evidence" that has happened, but it is not a "threshold requirement of proof."[212] When "direct evidence going to legislative purpose" suffices, "circumstantial evidence of a district's shape and demographics" is not required.[213]

An actual-conflict requirement also cannot be reconciled with *Shaw II*. The Court there rejected Justice Stevens's argument that strict scrutiny should not apply—even in the face of a predominant racial motive—as long as "'race-neutral, traditional districting criteria'" were *also* "at work."[214] Justice Stevens

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[209] *Alabama*, 135 S. Ct. at 1271 (quoting United States Amicus Br. at 19) (emphasis added).

[210] 515 U.S. 900, 910-11 (1995).

[211] *Id.* at 911.

[212] *Id.* at 913.

[213] *Id.* at 916.

[214] 517 U.S. at 907.

would have read *Shaw I*, *Bush v. Vera*,[215] and *Miller* "to require plaintiffs to prove that the State did not respect traditional districting principles in drawing majority-minority districts."[216] The majority disagreed: "That the legislature addressed these [traditional] interests does not in any way refute the fact that race was the legislature's predominant consideration."[217] The majority held that race predominated because it "was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting . . . incumbents came into play only after the race-based decision had been made."[218] The 55%-BVAP floor at issue in this case operated in exactly that way.

Similarly, *Bush* explained that race predominates when "racially motivated gerrymandering ha[s] a *qualitatively greater influence* on the drawing of district lines than politically motivated gerrymandering."[219] Racial considerations were found to have predominated there *despite* that "incumbency protection influenced the redistricting plan to an unprecedented extent."[220] The concept of "subordination" or "qualitatively greater influence" looks at whether

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[215] 517 U.S. 952 (1996).

[216] *Shaw II*, 517 U.S. at 933 (Stevens, J., dissenting).

[217] *Id.* at 907 (majority op.).

[218] *Id.*

[219] 517 U.S. at 979 (plurality) (emphasis added).

[220] *Id.* at 963.

race was a *more* important consideration than traditional factors, not at whether race contradicted or eclipsed other factors.

Intervenors are also wrong to argue that explicit racial quotas should be allowed as long as partisan politics could also explain the result.[221] The "central mandate [of the Equal Protection Clause] is racial neutrality in government decisionmaking."[222] "'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'"[223] A "racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect. This is true whether or not the reason for the racial classification is benign or the purpose remedial."[224]

Thus, even when a legislature has partisan motivations to draw voting districts to help Republicans or Democrats, its actions are subject to strict scrutiny if it uses race as the "proxy" for politics by assuming,

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[221] *See* Appellants' Br. at 29 ("[I]t is quite plausible that the BVAP resulting in Enacted District 3 directly furthers the Legislature's political interests and would be pursued absent any 'racial' motive.").

[222] *Miller*, 505 U.S. at 904.

[223] *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)).

[224] *Shaw II*, 517 U.S. at 904-05. *See also Bush*, 517 U.S. at 996 (Kennedy, J., concurring) ("In my view, we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races.").

for instance, that black voters overwhelmingly vote for Democratic candidates.[225] The intentional use of race in redistricting is different in kind from the use of political data that happens merely to "correlate with race."[226] Under Intervenors' theory, however, a legislature could use explicit racial quotas to pack black voters into a district to help neighboring Republicans and avoid strict scrutiny simply by arguing that the same outcome would have occurred had it used political data instead. The Equal Protection Clause does not tolerate such shortcuts. To put it bluntly, political gerrymandering may not be accomplished "by the use of race as a proxy."[227]

Tellingly, Intervenors do not cite the case that came closest to permitting racial targets *without* applying strict scrutiny, an interpretation that this Court has since renounced. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey (UJO)*,[228] a divided Court rejected a challenge by Hasidic plaintiffs

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[225] *Bush*, 517 U.S. at 968 (plurality) ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.").

[226] *Id. See also Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.").

[227] *Bush*, 517 U.S. at 969. *See also id.* at 997 (Kennedy, J., concurring) ("The State may not . . . use race as a proxy to serve other interests.").

[228] 430 U.S. 144 (1977) (plurality).

who claimed that their votes were diluted by a redistricting plan that used a "65% nonwhite majority" target for majority-minority districts in order to obtain DOJ preclearance.[229] In dissent, Chief Justice Burger called that "a strict quota approach."[230] But the Court subsequently disavowed any interpretation of *UJO* that would permit a State to employ racial targets *without* satisfying strict scrutiny. As the Court explained in *Miller*, *UJO* involved a "vote dilution claim," so its analysis "does not apply to a claim that the State has separated voters on the basis of race."[231] The Court added that a State's use of racial targets in assigning voters demands strict scrutiny, notwithstanding *UJO*:

> To the extent any of the opinions in that "highly fractured decision" can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to *anything but our strictest scrutiny*, those views ought not be deemed controlling.[232]

It would be surprising to give racial quotas in the redistricting context a free pass. This Court's

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[229] *Id.* at 152 (plurality).

[230] *Id.* at 182 (Burger, C.J., dissenting).

[231] *Miller*, 515 U.S. at 915 (citing *Shaw I*, 509 U.S. at 652).

[232] *Id.* (quoting *Shaw I*, 509 U.S. at 651) (emphasis added); *see also Bush*, 517 U.S. at 1000 (Thomas, J., joined by Scalia, J., concurring) ("Strict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting.").

Fourteenth Amendment jurisprudence "evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes."[233] Applying strict scrutiny to mechanical racial targets will not make redistricting more of a legal "minefield" for State legislatures, as Alabama and Texas argue.[234] To the contrary, the rule is easy for courts to administer and for States to understand. Rather than encouraging States to increase their reliance on racial quotas, the Court should send an unmistakable message that, if a racial floor is really needed, the government will be called upon to give a "sufficiently compelling justification" why.[235]

C. It was not clear error to reject Intervenors' 8-3 entrenchment claim.

Intervenors insist that the central purpose of the congressional redistricting plan was to deepen and entrench an 8-3 partisan split favoring Republicans in Virginia's eleven-member congressional delegation. Noting that black voters predominantly vote for Democrats, Intervenors argue that the fact that the BVAP increased in CD3, where Representative Bobby Scott was safely ensconced, was simply the result of politics, not race; having more black Democrats in CD3

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[233] *Bush*, 517 U.S. at 985 (plurality).

[234] Alabama Amicus Br. at 1-2.

[235] *Shaw I*, 509 U.S. at 642.

made the adjoining congressional districts safer for Republican congressmen.

That claim fails legally and factually. Even if the facts supported their 8-3 entrenchment theory, strict scrutiny would still apply when, as here, race was used to justify increasing the number of black voters in CD3. Strict scrutiny applied in *Bush*, notwithstanding the "pervasive use of race" as a "proxy to protect the political fortunes of adjacent incumbents."[236] The same is true here. *Bush* teaches that race should not be used as either the surrogate or the excuse to engineer a political outcome. As Justice Kennedy wisely wrote there, the "State may not . . . use race as a proxy to serve other interests."[237]

And even if the Constitution permitted using race as an ugly proxy for politics, the district court did not commit clear error in finding that the facts simply did not support Intervenors' 8-3 entrenchment theory. Contrary to Intervenors' hyperbole, it was not "undisputed" at trial that the purpose of the Enacted Plan was to preserve the 8-3 split,[238] nor did Janis ever say (let alone say "repeatedly") that "perpetuating

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[236] 517 U.S. at 972-73 (plurality); *see also id.* at 1000-01 (Thomas, J., joined by Scalia, J., concurring) (stating that strict scrutiny applies when the State "admits that it intentionally created majority-minority districts and that those districts would not have existed but for its affirmative use of racial demographics").

[237] *Id.* at 997 (Kennedy, J., concurring).

[238] JS 17-18.

the 8-3 split" was one of "the Enacted Plan's goals."[239] To the contrary, Janis said unequivocally that he had *not* looked at "partisan performance"; he insisted it "was not one of the factors that I considered in the drawing of the district."[240]

Intervenors emphasize that Janis said that he drew the districts "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections."[241] But the majority quite reasonably found that statement "ambiguous."[242] Two sentences later, Janis restated what he meant: that his plan respected "the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together."[243] Avoiding the pairing of incumbents is one thing; deepening a partisan split is quite another. Even the district court told the Special Master to ensure that incumbents were not paired together in any remedial district.[244] That does not mean that Janis intentionally increased the number of Republican and Democratic voters in their respective districts for the purpose of

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[239] Appellants' Br. at 35.

[240] JA 456 (IX-9 at 14:11-13).

[241] JA 352 (PX-43 at 4:6-8).

[242] JS 33a.

[243] JA 352 (PX-43 at 4:15-18).

[244] SM Report at 23-24.

deepening the partisan divide, something Janis expressly disavowed.

Intervenors also exaggerate their own involvement in the redistricting effort to imply a factual basis for the 8-3 entrenchment theory that the record does not support. In fact, their involvement was minimal. Janis said that each congressman had approved the lines for his own district but that none had seen the entire plan.[245] According to Intervenors' own interrogatory answers, their involvement was negligible. One congressman who spoke to Janis made no mention that partisan considerations informed his comments;[246] others made no mention of even speaking to Janis;[247] one denied having any input into his plan;[248] and most disclaimed any knowledge about how the plan was actually developed.[249]

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[245] JA 353 (PX-43 at 5:24-6:6); JA 452, 456 (IX-9 at 9:6-7, 13:23-14:2).

[246] JA 316 (PX-36 at 3) (Rep. Griffith) ("I had a conversation [with Janis] regarding redistricting and stated something along the lines of 'I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District.'").

[247] JA 338-39 (PX-39 at 1-2) (Rep. Wittman); JA 332-33 (PX-38 at 1-2) (Rep. Rigell); JA 344-45 (PX-40 at 1) (Rep. Wolf).

[248] JA 303-04 (PX-34 at 1-2) (Rep. Forbes) ("Janis asked for my feedback and comments on the redistricting plan, but I did not provide any.").

[249] JA 299 (PX-33 at 2) (Rep. Cantor) ("I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting . . . ."); JA 311 (PX-35

(Continued on following page)

Given the comparatively weak evidence supporting the 8-3-entrenchment theory, the district court did not commit clear error by crediting Janis's explicit testimony that he did not look at partisan performance in drawing the plan. Intervenors credit Janis's other, more ambiguous statements as a "display of candor rarely seen" in redistricting.[250] But the majority was entitled to find Janis's explicit denial of partisan gerrymandering to be candid and, on that point, dispositive.

It is true that McDonald had written a law review article in 2012 (before his expert engagement) in which he "had determined that the intent was to create an 8-3 Republican majority."[251] Judge Payne thought that the article discredited McDonald's trial testimony.[252] But the majority found McDonald's testimony credible and believed his explanation: when he wrote the article, he had not yet read the legislative history, had not yet performed a racial bloc voting analysis, had not yet analyzed population swaps between districts, and had not yet drawn any conclusions about whether race was the predominant factor in redrawing CD3.[253]

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at 2) (Rep. Goodlatte), JA 319 (PX-36 at 6) (Rep. Griffith), JA 327 (PX-37 at 2) (Rep. Hurt), JA 334 (PX-38 at 2) (Rep. Rigell) (all same, verbatim).

[250] JS 20; Appellants' Br. at 37.

[251] JA 650 (Tr. 129:20-25).

[252] JS 48a-53a.

[253] JS 21a n.16; *see* JA 733 (Tr. 226:4-21).

As for the defense expert, the majority discounted Morgan's contrary testimony that politics explained CD3, pointing to Morgan's weaker credentials and the analytical errors exposed at trial.[254] Judge Payne, by contrast, believed Morgan.[255]

When, as here, reasonable triers of fact hearing the same evidence could have decided the case differently or formed different opinions about the credibility of the parties' respective experts, "such questions of credibility are matters for the District Court."[256] It is a mistake to "second-guess[ ] the District Court's assessment of the witnesses' testimony."[257] Credibility determinations such as these "can virtually never be clear error."[258]

D. The evidence of racial predominance distinguishes this case from *Easley*.

The evidence of racial predominance here clearly distinguishes this case from *Easley*, the principal case on which Intervenors rely. In *Easley*, there was only scant evidence that race played a material role. The Court had considered the matter once before, in *Hunt v. Cromartie*, noting that plaintiffs had "offered only

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[254] JS 21a n.16.

[255] JS 83a.

[256] *Bush*, 517 U.S. at 970 (plurality).

[257] *Id.* at 971 n.*.

[258] *Anderson*, 470 U.S. at 575.

circumstantial evidence in support of their claim"[259] and had "presented no direct evidence of intent."[260] They had focused principally on the district's shape, lack of compactness, and locality splits.[261] That evidence was insufficient on summary judgment to prove that race predominated over political considerations.[262] So the Court remanded the case for further proceedings.

On remand, the district court considered additional evidence that it found sufficient to show that race predominated,[263] but a majority of this Court again disagreed. The circumstantial evidence—"the district's shape, its splitting of towns and counties, and its high African-American voting population"—was not determinative. Because "racial identification is highly correlated with political affiliation in North Carolina," those characteristics could also have been explained by political gerrymandering.[264]

Easley found the additional, supposedly "'direct' evidence"[265] also inadequate. The redistricting leader had commented that "I think that overall [the plan] provides for a fair, geographic, *racial* and partisan

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[259] 526 U.S. at 547.

[260] *Id.* at 549.

[261] *Id.* at 547-48.

[262] *Id.* at 552.

[263] 532 U.S. at 240-41.

[264] *Id.* at 243.

[265] *Id.* at 253.

balance throughout the State of North Carolina."[266] Five Justices considered that comment insufficient to prove that race *predominated*.[267] The four dissenting Justices, by contrast, thought it adequate under the clear-error standard.[268]

The second piece of direct evidence in *Easley* was an email from a staff member to two legislators indicating that the boundary had been adjusted for members of an African-American community, but the email did "not discuss why."[269] While the majority thought that the email provided "some support" for the district court's conclusion, it was "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases."[270] As examples of such direct-evidence cases, the majority cited:

- *Bush*, where the State had "conceded that one of its goals was to create a majority-minority district";

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[266] *Id.* at 253 (emphasis added).

[267] *Id.* ("We agree that one can read the statement about 'racial . . . balance' . . . to refer to the current congressional delegation's racial balance. But even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a *predominant* role comparatively speaking.").

[268] *Id.* at 266-67 & n.8 (Thomas, J., joined by Roberts, C.J., and Scalia and Kennedy, JJ., dissenting).

[269] *Id.* at 254.

[270] *Id.*

- *Miller*, where the State "set out to create [a] majority-minority district"; and
- *Shaw II*, where the plan's draftsman testified "that creating a majority-minority district was the 'principal reason' for" the challenged district.[271]

The direct evidence in this case, taken in the light most favorable to Plaintiffs, is far stronger: the General Assembly used a 55% floor to raise the BVAP in CD3 from 53.1% to 56.3%, for the avowed purpose of obtaining preclearance under § 5 by preserving a safe majority-minority district. Thus, in contrast to *Easley*, there was ample direct evidence here that race was the predominant consideration in drawing CD3.

This case is also distinguishable from *Easley* because credibility determinations played only "a minor role" there.[272] In this case, by contrast, the judges below were sharply at odds about the credibility of McDonald and Morgan. The majority credited McDonald and found Morgan not credible on the key issues of whether the legislature employed a 55%-BVAP floor and whether race, rather than politics, explained CD3; Judge Payne reached opposite conclusions about their credibility.[273]

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[271] *Id.*

[272] 532 U.S. at 243.

[273] *See supra* at 15-17, 53-54.

"The issue in this case is evidentiary."[274] The district court resolved the conflicting evidence by finding that the General Assembly imposed a 55%-BVAP floor in drawing CD3 to meet the "primary," "paramount," and "nonnegotiable" goal of avoiding retrogression. Because substantial evidence supported that conclusion, it was not clearly erroneous.

E. Plaintiffs' Alternative Plan supported their claims, though Plaintiffs were not required to submit one.

Also relying on *Easley*, Intervenors argue that Plaintiffs had the burden to introduce an alternative plan to show how the districts could have been redrawn consistent with traditional redistricting principles while bringing about greater racial balance.[275] They claim that Plaintiffs' Alternative Plan[276] failed to satisfy that alleged burden.

Assuming that Plaintiffs had that burden, they met it. The BVAP in CD3 in the Alternative Plan was 50.2%, significantly less than the 56.3% in the Enacted Plan.[277] And the majority found that the Alternative Plan "maintains a majority-minority district and achieves the population increase needed for parity, while simultaneously minimizing locality splits

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[274] *Easley*, 532 U.S. at 241.

[275] Appellants' Br. at 39.

[276] JA 257-73 (PX-29) (analysis), JA 424-26 (PX-49) (maps).

[277] JA 257, 268 (PX-29 at 1, 8).

and the number of people affected by such splits."[278] That finding was amply supported by McDonald's trial testimony.[279]

Intervenors overstate the claim that the Enacted Plan better preserved the cores of existing districts than the Alternative Plan. The Alternative Plan preserved 69.2% of the core of Benchmark CD3 compared to 83.1% under Enacted CD3. But 69.2% was not significantly worse than in Enacted CD11, which preserved 71.2% of the benchmark district.[280] Morgan conceded on cross-examination that the *total* average difference in core preservation for the Enacted Plan and the Alternative Plan across all 11 districts was only 1.5%.[281] And McDonald testified that the range of core-preservation statistics for the two plans was "substantially similar"[282] and that the difference was "not significant."[283]

The majority also properly rejected Intervenors' main criticism of the Alternative Plan—that it failed to preserve an alleged 8-3 split favoring Republicans. As shown above, the court properly rejected that

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[278] *See* JS 28a.

[279] JA 632-39 (Tr. 109-17); *see also* JA 257-73 (PX-29).

[280] JA 515-16 (IX-27); *see also* JA 794-95 (Tr. 312:2-24).

[281] JA 857 (Tr. 383:5-12).

[282] JA 887 (Tr. 420:8-9).

[283] JA 888-89 (Tr. 421:15-20).

theory, finding Intervenors' claim "overstated" and the factual premise lacking.[284]

In any case, an alternative plan is not required in a direct-evidence case like this one. An alternative plan may provide circumstantial evidence that race predominated. That the legislature *could* have accomplished its objectives without relying so much on race helps prove that it *did* rely too much on race. But circumstantial evidence is unnecessary when, as here, direct evidence proves that race predominated.

Easley is not to the contrary. As shown above, the evidence there was too weak to "show that racial considerations predominated in the drawing of the District's . . . boundaries."[285] It was in that context that the Court said:

> In a case *such as this one* where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show *at the least* that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those

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[284] JS 16a n.12.

[285] 532 U.S. at 257.

> districting alternatives would have brought about significantly greater racial balance.[286]

Read in context, that passage was talking about cases with weak evidence of racial motivation (like *Easley*), not cases with *direct evidence* of racial engineering (like *Bush*, *Shaw II*, *Miller*, and this case). Without such direct evidence, a plaintiff necessarily must use other means to prove racial motivation.

Alabama also made clear that circumstantial proof is unnecessary when *direct* evidence suffices:

> We have said that the plaintiff's burden in a racial gerrymandering case is "to show, *either* through *circumstantial* evidence of a district's shape and demographics *or* more *direct* evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." [*Miller*, 515 U.S. at 916]. *Cf. Easley v. Cromartie*, 532 U.S. 234, 258 [ ] (2001) (explaining the *plaintiff's burden* in cases, *unlike these*, in which the State argues that politics, not race, was its predominant motive).[287]

The either-or formulation from *Miller* shows that either direct evidence or circumstantial evidence may suffice. And the "*Cf.*" citation to *Easley*, coupled with

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[286] *Id.* at 258 (emphasis added).

[287] 135 S. Ct. at 1267 (emphasis added).

the Court's parenthetical explanation distinguishing plaintiffs' burden in direct-evidence cases like *Alabama*, make clear that the burdens *Easley* described do not apply in direct-evidence cases like this one.

If Intervenors were right, then a plaintiff would lose a redistricting challenge, in spite of smoking-gun admissions of racial packing, simply for failing to offer an alternative plan. No alternative plan was needed to prove racial predominance in direct-evidence cases like *Shaw II*, *Miller*, and *Bush*, and none was needed here.

III. The district court did not commit clear error in finding that the use of race was not narrowly tailored to avoid retrogression.

"If race is the predominant motive in creating [a district], strict scrutiny applies, and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive."[288] The district court ruled that compliance with § 5 was a compelling interest at the time the district was redrawn in 2012.[289]

It remains an open question if "continued compliance with § 5 remains a compelling interest" in

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[288] *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (citation omitted). *See also Hunt*, 526 U.S. at 546; *Miller*, 515 U.S. at 904, 920.

[289] JS 14a, 36a-38a.

light of *Shelby*.[290] As it has done many times before, however, the Court can assume that it is.[291] For even crediting that assumption, the use of a mechanical racial floor here was not narrowly tailored to serve that interest.

A reapportionment plan is "'not . . . narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.'"[292] "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."[293]

The district court did not commit clear error in concluding that Enacted CD3 flunked that test.

A. Avoiding retrogression did not require freezing or increasing the BVAP in CD3.

First, as a matter of law, the avoidance of retrogression under § 5 did not require that Virginia maintain the same percentage of black voters in CD3 as in the benchmark plan, let alone that it maintain CD3

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[290] *Alabama*, 135 S. Ct. at 1274.

[291] *E.g.*, *Abrams*, 521 U.S. at 91; *Bush*, 517 U.S. at 977 (plurality); *see also Shaw II*, 517 U.S. at 908 n.4.

[292] *Shaw I*, 509 U.S. at 655.

[293] *Bush*, 517 U.S. at 983 (plurality opinion).

as a supermajority black district. As the Court said last year in *Alabama*, § 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice."[294]

That point was not new. In 2003, all Justices agreed in *Georgia v. Aschroft*[295] that § 5 did not preclude a State from reducing the BVAP in a district, even below 50%,[296] but the Justices disagreed about the standard for evaluating retrogression. Five Justices called for evaluating "the totality of the circumstances," without focusing "solely on the comparative ability of a minority group to elect a candidate of its choice."[297] Justice Souter, writing for the four dissenting Justices, focused exclusively on ability to elect. He agreed, however, that in districts "with low racial bloc voting or significant white crossover voting, a decrease in the black proportion may have no effect at all on the minority's opportunity to elect their candidate of choice."[298] A State therefore could convert a majority-minority district into a minority-influence district as long as "minority voters will have effective influence translatable into probable election results

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[294] 135 S. Ct. at 1272.

[295] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

[296] *Id.* at 480-85; *id.* at 498-99, 505 (Souter, J., dissenting).

[297] *Id.* at 480 (majority op.).

[298] *Id.* at 499 (Souter, J., dissenting).

comparable to what they enjoyed under the existing district scheme."[299] When Congress amended the VRA in 2006, it "adopted the views" of Justice Souter's dissent in *Aschroft*.[300]

In February 2011, weeks before Janis introduced his redistricting plan, DOJ published its Guidelines on § 5 compliance, making clear that "the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district."[301]

Thus, at the time of the redistricting at issue here, § 5 did not impose any mechanical racial floor under which the State could not reduce the percentage of black voters. In this case, as in *Alabama*, the legislature posed "the wrong question" in asking: "'How can we maintain present minority percentages in majority-minority districts?'"[302] The theory underlying that flawed premise would operate as a "one-way ratchet: the black population of a district could

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[299] *Id. See also id.* at 505 ("[T]he core holding of the Court today, with which I agree, [is] that nonretrogression does not necessarily require maintenance of existing super-majority minority districts").

[300] *Alabama*, 135 S. Ct. at 1273 (discussing *Georgia v. Ashcroft*, 539 U.S. 461 (2003)).

[301] 76 Fed. Reg. at 7,471; JA 593-94 (Tr. 62-63).

[302] 135 S. Ct. at 1274.

go up, either through demographic shifts or redistricting plans . . . [b]ut the legislature could never lower the black percentage . . . ."[303] The right question asks instead about the functional ability of minority voters to elect a candidate of choice:

> [G]iven § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, [the legislature] should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?"[304]

In this case, there was no need for a 55%-BVAP floor, let alone the need to increase the BVAP in CD3 to 56.3%.[305] CD3 had been "a safe majority-minority district for 20 years."[306] Representative Scott, a Democrat supported by the majority of African-American voters, was winning 69.3% of the vote or more when running against Republican opponents.[307] Under

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[303] *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1340 (D. Ala. 2013) (Thompson, J., dissenting), *rev'd*, 135 S. Ct. 1257 (2015).

[304] *Alabama*, 135 S. Ct. at 1274. Rather than asking the right question, Alabama now asks this Court to hold that a 55%-BVAP floor operates as a safe harbor. Alabama Amicus Br. at 13. But that would simply trade one mechanical floor for another, neither of which is supported by a functional analysis of voting behavior.

[305] JS 9a, 20a-21a, 37a n.26, 42a.

[306] JS 40a.

[307] *Id.*; JA 204 (PX-27 at 11).

Enacted CD3, he defeated the Republican candidate in 2012 with 81.3% of the vote.[308]

That fact makes this case similar to *Bush*, where Texas's redistricting plan failed the narrow-tailoring inquiry when it increased the black population in one district from 40.8% to 50.9%. Texas showed "no basis for concluding that the increase to a 50.9% African-American population . . . was necessary to ensure nonretrogression."[309] The same is true for the BVAP increase here.

Nor was it clear error to reject the argument that the legislature might reasonably have "believed" that a 55%-BVAP floor was necessary.[310] As a matter of law, even assuming DOJ actually had a policy to deny preclearance for districts with BVAP scores under 55%, it would not justify blind obedience. Covered jurisdictions had the option to seek preclearance instead through the United States District Court for the District of Columbia.[311] Indeed, Georgia could not justify the intentional creation of a third black-majority district simply by claiming that DOJ had refused to preclear the plan without it.[312] *Miller* made clear that

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[308] JS 40a; JA 204 (PX-27 at 11).

[309] *Bush*, 517 U.S. at 983 (plurality).

[310] JS 18a n.13.

[311] *E.g.*, *Shaw I*, 509 U.S. at 635 ("Under § 5, the State remained free to seek a declaratory judgment from the District Court for the District of Columbia notwithstanding the Attorney General's objection.").

[312] 515 U.S. at 921.

VRA compliance "cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."[313] The Court flatly rejected "the contention that the State has a compelling interest in complying with whatever pre-clearance mandates the Justice Department issues."[314]

In any event, DOJ disclaimed the very position asserted by Janis, before he introduced his plan, so it was not reasonable to believe that mechanical racial floors were required.[315] Some legislators were well aware of the law. Delegate Armstrong called out Janis's plan for lacking the functional analysis needed to determine if it would "crack and pack" black voters, explaining that DOJ had not "pegged" retrogression to "a particular number."[316]

Virginia's own experience also ran counter to the notion of a 55%-BVAP floor. DOJ had precleared CD3 in 1998 with a BVAP of 50.47%.[317] And in 2011, the year before Janis's plan was adopted, DOJ precleared five of Virginia's majority-black Senate districts with BVAP percentages *less* than 55%, including one with a BVAP of 50.8%.[318]

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[313] *Id.*

[314] *Id.* at 922.

[315] 76 Fed. Reg. at 7,471; *see* JA 593-94 (Tr. 62-63).

[316] JA 389 (PX-43 at 47:4-48:1).

[317] JA 380-81 (Tr. 48:5-12); JA 427 (PX-50).

[318] JA 626-28 (Tr. 102:1-103:11); *see* JA 275 (PX-30 at 2).

So the district court could properly find that the legislature could not have formed a "reasonable belief"[319] that it was necessary to increase the number of black voters in CD3 above a 55% floor.[320] The district court was understandably concerned that accepting that claim would give States "carte blanche to engage in racial gerrymandering in the name of nonretrogression."[321]

B. The only defense witness offered no testimony on the narrow-tailoring question.

The district court also did not err in its narrow-tailoring conclusion because, quite simply, the only defense witness who testified disclaimed any position on the subject. Once Plaintiffs showed that race predominated, the burden shifted to the defense to prove that the use of race was narrowly tailored to avoid

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[319] *Abrams*, 521 U.S. at 113 (Breyer, J., dissenting).

[320] *Cf. Bush*, 517 U.S. at 983 (plurality) ("The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage . . . . ").

[321] JS 39a (quoting *Shaw I*, 509 U.S. at 654).

retrogression.[322] Yet Morgan testified that he was offering *no opinion* on that topic.[323]

That admission was dispositive. The narrow-tailoring prong in a redistricting case "allows the States a limited degree of leeway" in complying with the VRA, provided the State has a "'strong basis in evidence'" to conclude that the majority-minority district "is reasonably necessary to comply" with the law.[324] There could be no "strong basis in evidence" in the absence of evidence to carry that burden.

C. Narrow tailoring cannot be shown by criticizing the Alternative Plan.

Finally, Intervenors cannot bridge the evidentiary gap in their narrow-tailoring defense by attacking *Plaintiffs'* Alternative Plan. As shown above, the evidence supported the majority's conclusion that the Alternative Plan would have met the legislature's redistricting goals while improving racial balance.

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[322] *E.g.*, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) ("Strict scrutiny requires the [government] to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'") (quoting *Bakke*, 438 U.S. at 305 (opinion of Powell, J.)).

[323] JA 828 (Tr. 349:16-23).

[324] *Alabama*, 135 S. Ct. at 1274; *Bush*, 517 U.S. at 977 (plurality) (quoting *Shaw I*, 509 U.S. at 656).

The Alternative Plan thus showed the *absence* of narrow tailoring.

But more importantly, "it is the government that bears the burden to prove that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate."[325] Criticizing someone else's redistricting plan does not show that the government needed to use a 55%-BVAP floor to protect black voters.

* * *

Intervenors make good arguments about their view of the evidence. We joined their arguments in the district court. But the majority of the three-judge court disagreed and resolved the factual conflicts in Plaintiffs' favor.

This case now must be assessed in light of the district court's factual findings, its credibility determinations, and the clear-error standard. That assessment mandates affirmance. Applying a 55%-BVAP floor to sweep thousands of black voters into CD3, when that was entirely unnecessary to protect their voting rights, plainly fails strict scrutiny.

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[325] *Fisher*, 133 S. Ct. at 2419 (citation and quotation omitted).

"It is a sordid business, this divvying us up by race."[326] "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."[327] Such explicit reliance on race "threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."[328]

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[326] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

[327] *Shaw I*, 509 U.S. at 657.

[328] *Id.*

CONCLUSION

The judgment of the district court should be affirmed.

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No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. APPELLEES FAIL TO REHABILITATE THE MAJORITY'S LEGAL ERRORS 1

A. The Undisputed Facts Foreclose Plaintiffs' Claim 1

B. *Alabama* And *Bush* Underscore The Majority's Errors 3

II. PLAINTIFFS FAILED TO PROVE THAT RACE SUBORDINATED TRADITIONAL PRINCIPLES 7

III. PLAINTIFFS FAILED TO PROVE THAT RACE RATHER THAN POLITICS PREDOMINATED 11

IV. THE LEGISLATIVE HISTORY REFUTES PLAINTIFFS' CLAIM 18

V. THE MAJORITY MISAPPLIED STRICT SCRUTINY 21

VI. APPELLANTS HAVE STANDING 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 9

Ala. Leg. Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) ..... *passim*

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 24

Bush v. Gore,
531 U.S. 98 (2000) 24

Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

Clements v. Fashing,
457 U.S. 957 (1982) 25

Diamond v. Charles,
476 U.S. 54 (1986) 24

Easley v. Cromartie,
532 U.S. 234 (2001) ..... *passim*

Elec. Fittings Corp. v. Thomas & Betts Co.,
307 U.S. 241 (1939) 24

Georgia v. Ashcroft,
539 U.S. 461 (2003) 21

Gross v. FBL Fin. Servs.,
557 U.S. 167 (2009) 7

Hunt v. Cromartie,
526 U.S. 541 (1999) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Meese v. Keene,
481 U.S. 465 (1987) 24

Miller v. Johnson,
515 U.S. 900 (1995) 3, 9

Moon v. Meadows,
952 F. Supp. 1141 (E.D. Va.),
summ. aff'd, 521 U.S. 1113 (1997)..... 10, 23

Mt. Healthy City Sch. Dist. v. Doyle,
429 U.S. 274 (1977) 7

Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville,
508 U.S. 656 (1993) 24

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 25

Shaw v. Hunt,
517 U.S. 899 (1996) 7, 8

Swann v. Adams,
385 U.S. 440 (1967) 24

Texas v. United States,
887 F. Supp. 2d 133 (D.D.C. 2012),
vacated, 133 S. Ct. 2885 (2013) 23

Thornburg v. Gingles,
478 U.S. 30 (1986) 22

United States v. Hays,
515 U.S. 737 (1995) 25

Voinovich v. Quilter,
507 U.S. 146 (1993) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

52 U.S.C. § 10301 21

52 U.S.C. § 10304 22

OTHER AUTHORITIES

Rachel Weiner, "Randy Forbes To Run In Different District Thanks To New Map," WASHINGTON POST, Feb. 8, 2016..... 25

I. APPELLEES FAIL TO REHABILITATE THE MAJORITY'S LEGAL ERRORS

A. The Undisputed Facts Foreclose Plaintiffs' Claim

Appellees' briefs confirm the absence of any material factual dispute. Appellees do not dispute:

- Enacted District 3 is the *only* alternative introduced in the Legislature or court that preserves the 8 Republican incumbents' re-election prospects.

- Plaintiffs' Alternative converted a Republican incumbent's district into a "heavily Democratic" district.

- The racial percentages of the VTDs added to, or already within, District 3 almost precisely mirror the Democratic percentages.

- District 3's shape and demographics would have made "perfect sense" for "political" reasons if everyone in the District was "white."

- Core preservation and respecting the will of the 2010 electorate were the *most important* neutral policies controlling the Enacted Plan.

- The cores of *all* districts were preserved in the same manner.

- The majority found that "protecting

> incumbents" and "partisan politics" "inarguably" "motiv[ated]" District 3's lines.

Opening Brief ("OB") 3-12, 35-36.

Since it is undisputed that a 56.3%-BVAP District 3 best serves the Legislature's most important traditional and political objectives, there can be no *Shaw* violation even assuming the Legislature misinterpreted Section 5 to preclude diminishing BVAP below 55% (or the Benchmark 53.1% BVAP). *Shaw* does not prohibit considerations of race in the *abstract*, but only if they lead to some action with real-world consequences; *i.e.*, a "direct and significant impact" on district lines by "subordinat[ing]" the "traditional districting principles" that would otherwise govern. *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270-71 (2015). Also, where, as here, the "State argues that politics, not race, was its predominant motive," *id.* at 1267, Plaintiffs must prove that "race *rather than* politics" was the "*predominant*" reason that traditional districting principles were subordinated. *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) ("*Cromartie II*").

Neither showing is possible where, as here, the district with the alleged BVAP floor best complies with the most important principles governing all districts and best serves political objectives. Race is not the "but for," much less "predominant," cause of a district's facially neutral shape and demographics if they would have been the same absent race. While majority-minority districts may not be *created* at the expense of neutral or political objectives, such districts need not be *dismantled* at the expense of those objectives. Appellees' contrary rule would turn

Shaw on its head by requiring application of different principles to minority districts than to non-minority districts. OB 33.

B. *Alabama* And *Bush* Underscore The Majority's Errors

Appellees' overriding response is that *Shaw* prohibits preservation of majority-minority districts—or the benchmark BVAP—even absent any inconsistency between such Section 5 preservation and the core preservation and political objectives applied to majority-white districts, solely because Section 5 ranks higher in the "hierarchy" of districting principles than these discretionary principles. Pl. Br. ("PB") 21-27; Def. Br. ("DB") 35-38. Specifically, Appellees contend that *Alabama* and *Bush v. Vera*, 517 U.S. 952 (1996), establish that "direct evidence" of a BVAP floor or intentional creation of a majority-minority district establishes that race "predominated" over neutral principles even if, as here, the racial goal is co-extensive with those principles. Such "direct evidence" of Section 5's primacy also purportedly negates the need to disprove politics as an explanatory variable *in any way*, much less through an alternative plan that accomplishes the legislature's "legitimate political objectives." PB 49-53; DB 54-58; *Cromartie II*, 532 U.S. at 242. But *Alabama* and *Bush*, like all *Shaw* cases, establish just the opposite: race "predominate[s]" only if plaintiffs meet the "demanding burden" of proving both that race "*subordinates*" traditional principles and that politics or incumbency protection do not "explain" the district "as well" as "race." *Bush*, 517 U.S. at 967 (plurality); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("To make

[predominance] showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles."). Indeed, the mere existence of a BVAP floor *cannot* establish "predominance" because Section 5 *requires* such a floor (the percentage needed to avoid "diminishing" minorities' "ability to elect") and Section 5 cannot inherently violate *Shaw* because, as here, that floor is often consistent with neutral principles and politics. OB 28-32.

1. In *Alabama*, "a *primary* redistricting goal was to maintain existing racial percentages in *each*" of the 34 "majority-minority district[s]." 135 S. Ct. at 1271 (emphasis added). Under Appellees' "predominance" theory, this direct evidence of the "primary" BVAP-maintenance goal *ipso facto* establishes racial predominance in all such districts. *Alabama*, however, did not hint that "predominance" was established in all the districts subject to this goal. Rather, such predominance was (potentially) established only in districts where there was "considerable evidence that this goal had a direct and significant impact on" the boundaries. *Id.* That is because, to establish that "race was the predominant factor," the "plaintiff must prove that the Legislature *subordinated traditional race-neutral districting principles* to racial considerations." *Id.* at 1271.

Indeed, as the Solicitor General explained, Alabama's "no reduction" policy violated *Shaw* only if it "conflict[ed]" with and caused "the derogation of traditional districting criteria." *Ala.* Tr. 30, 32; *see id.* 27-37. Consequently, *Alabama* did not suggest that the district court on remand consider all 34 districts subjected to this BVAP-maintenance goal,

but only "District 26 and likely other" districts where this goal potentially caused "subordination" and had a "direct and significant impact" on lines. 135 S. Ct. at 1270.

2. In *Bush*, voluminous direct evidence from "state officials" "conceded" "that the challenged districts" were "created for the purpose of enhancing opportunities for minorities" and that "the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data." 517 U.S. at 961-62. But even this overwhelming direct (and circumstantial) evidence was insufficient to establish "predominance," because "direct evidence" is "merely one of several essential ingredients," and plaintiffs must prove that "traditional districting criteria [were] *subordinated to race*" to establish "predominance." *Id.* at 958, 962 (emphasis original).

Consequently, the *Bush* plurality emphasized that, to resolve whether "it was *race* that *led to* the neglect of traditional districting criteria," courts "*must* therefore consider what role other factors played . . . to determine whether race predominated." *Id.* at 963 (emphasis added). Specifically, if "incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness," no *prima facie* case is established even if the "voters being fought over . . . were African-American." *Id.* at 967-68. Such deliberate shifting of black voters does not "convert a political gerrymander into a racial gerrymander" "no matter

how conscious redistricters were of the correlation between race and party." *Id.* Thus, race predominated in *Bush* only because a detailed review of whether incumbency protection explained the departure from traditional principles "compel[led]" the "inescapable" "conclusion" that the "contours of" "challenged districts" were "unexplainable in terms other than race" and "racial quotas." *Id.* at 969-73.

Similarly, that racial predominance is established when "racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering," *id.* at 969, *refutes* Appellees' "rank ordering" theory. DB 45; *see* PB 21-27, 48. The question is not whether race is *ranked higher* than neutral objectives, but only whether "*district lines*" were "qualitatively *greater influence[d]*" by race, which must be established by, for example, showing that district lines were "tailored perfectly to maximize minority population" but "far from the shape" that "maximize[s] the Democratic vote." *Bush*, 517 U.S. at 971. Here, the majority made *no* finding that district lines departed from incumbency protection and political goals, much less had a qualitatively stronger correlation with race, precisely because it is undisputed that District 3 benefitted all adjacent Republican incumbents.

Even the concurring opinion in *Bush* rejects Appellees' position because it would apply strict scrutiny only where the "legislature affirmatively undertakes to create a majority-minority district that would not have existed *but for* the express use of racial classifications." *Id.* at 1001 (concurrence) (emphasis added). Where, as here, the majority-

minority district would have been preserved absent race (under the statewide core-preservation and incumbency-protection priorities), Plaintiffs have not proven that the district "would not have [been preserved] 'but for'" race.

This "but for" causation requirement inheres in the requirement that *Shaw* plaintiffs establish that the district was drawn "because of" race, particularly in "mixed motive" cases like this. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176, 178 (2009) (since ADEA prohibits adverse action "*because of*" age, plaintiff in mixed-motive case must prove "age was the 'but for' cause of the" action); *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 286 (1977) (no liability unless challenged action taken "because of" prohibited criterion).[1]

II. PLAINTIFFS FAILED TO PROVE THAT RACE SUBORDINATED TRADITIONAL PRINCIPLES

Appellees argue that District 3 subordinated traditional principles, but do not dispute that the

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[1] In *Shaw v. Hunt* ("*Shaw II*"), race was clearly the "but for" cause of challenged District 12, because the State was forced to create it by the Justice Department's illegitimate Section 5 "policy of maximizing the number of majority-black districts" after the State *rejected* a "second [black] district" in order to protect "white incumbents." 517 U.S. 899, 913 (1996); *id.* at 938 n.15 (Stevens, J. dissenting); *cf.* Gov. Br. ("GB") 32 n.10. While the State tried to *lessen* the negative effect on incumbents relative to *other* majority-black district options, creating *some* such district was *solely* a racial decision and "protecting Democratic incumbents came into play only after the race-based decision had been made." 517 U.S. at 907.

highest-ranking neutral principles were core preservation and the closely related policy of honoring the will of the 2010 electorate, which produced an 8-Republican and 3-Democrat delegation. PB 42-43; DB 5-6.

This concession is dispositive: since core preservation and incumbency protection were both the most important neutral principles and consistently applied to all districts, even where Section 5 was not a factor, preservation of District 3 was neither race-based nor a departure from neutral principles. Where, as here, the Legislature preserves the cores of all districts, treating the majority-minority district the *same* cannot be "predominantly racial." As in social science, the best way to determine which of two potential explanatory variables causes a result is to eliminate one and see if the same result occurs. Here, "race" (Section 5) is eliminated in Virginia's 10 majority-white districts, but the same core-preservation result occurs. Thus, race cannot be the "predominant" cause of District 3's preservation. The majority's contrary rule perversely demands race-based discrimination because it requires a different standard that deprives District 3 of the constituent consistency provided to the majority-white districts.

The Legislature's *preservation* of District 3 distinguishes other *Shaw* cases involving *creation* of new majority-minority districts. Such new districts disrupt the *status quo* and threaten incumbents, so it may be readily inferred that they subordinate traditional principles because, absent race, the State would not promote such disruption. *Shaw II*, 517 U.S. at 917. But such an inference is illogical where,

as here, core preservation is the "dominant and controlling" plan-wide criterion. *Miller*, 515 U.S. at 913-16.

Moreover, the majority simply ignored the dispositive role of core preservation when it criticized District 3's compactness, boundary splits, and water contiguity. OB 50-53. It remains undisputed that *all* these alleged flaws *necessarily* resulted from core preservation, because all were inherited from Benchmark District 3. Thus, the majority's preferred redistricting criteria were not subordinated to *race*, but to *core preservation*.

Unable to dispute this, Appellees proffer arguments so meritless that not even the majority advanced them. First, Appellees contend that subordinating compactness to core preservation is impermissible because the Fourteenth Amendment requires compactness to trump core preservation. PB 32-36. This assertion directly contravenes the basic principle that state legislatures, not the federal judiciary, prioritize among neutral principles. *Miller*, 515 U.S. at 915.

Moreover, the amorphous concept of "compactness" cannot be divorced from preserving cores. *Shaw* cases do not look at a district's shape in isolation, but whether the district "is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest." *Bush*, 517 U.S. at 977 (plurality); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (Section 2 compactness examines whether district adheres to "traditional districting principles, such as maintaining communities of interest"). Here,

preserving District 3's core maintains the community of interest formed around residing in the same congressional district for almost two decades. JA 98. Anyway, District 3's compactness is materially indistinguishable from both Plaintiffs' Alternative and the majority-white District 11. OB 50-53.

Appellees next argue that District 3's core could *not* be preserved because it "perpetuates the racial gerrymander" found in *Moon*. PB 3. But the majority eschewed this argument, because District 3 actually perpetuates the *Moon remedy*, which, it was undisputed, "conform[ed] to . . . the Constitution." *Moon v. Meadows*, 952 F. Supp. 1141, 1151 (E.D. Va.), *summ. aff'd*, 521 U.S. 1113 (1997).

Finally, like the majority, Appellees illogically criticize the Legislature for not preserving District 3's core to the *maximum* extent possible, because it moved more people than needed to correct District 3's population shortfall (when irrationally viewed in isolation, without regard to, for example, adjacent District 2's need to gain substantial population). PB 36-37. But the question is not whether District 3's core was maximally preserved, but whether preserving it caused the compactness and district line issues, which there is no dispute it did. Moreover, the Legislature preserved District 3's core to roughly the same extent as the majority-white districts and far better than any alternative, including Plaintiffs' Alternative and the remedial plan. OB 52; Remedial Plan Core Preservation (DE 279-2).

III. PLAINTIFFS FAILED TO PROVE THAT RACE RATHER THAN POLITICS PREDOMINATED

Even if District 3 subordinated traditional principles, there is still no *prima facie* case because Plaintiffs failed to prove that "race *rather than* politics" caused such subordination. Even assuming Plaintiffs need not disprove politics as the motive through the "alternative" expressly required by *Cromartie II*, 532 U.S. at 258, they have to prove it *somehow*. This cannot be done, where, as here, *Plaintiffs'* evidence *alone* shows that politics necessitated District 3's shape and demographics, because (1) *their* proposed alternative, which decreased District 3's BVAP by only 3%, converted an adjacent toss-up district into a "heavily Democratic" one; (2) *their* expert's analysis demonstrated that all VTD swaps had a beneficial political effect indistinguishable from their racial effect; (3) *their* expert conceded both that Intervenor-Defendants' expert established the same thing and that District 3 would have made "perfect sense" for "political" reasons if all involved were "white." OB 3-12, 35-36.

The government concisely explained in *Cromartie II* why plaintiffs must decouple race and politics. It successfully contended that "when . . . race correlates highly with partisan voting behavior, it is predictable that a State that wants to create a district whose borders tend to concentrate members of a particular political party will, as a byproduct, create a district whose borders tend to concentrate members of a particular race." *Cromartie II* U.S. Br. 14. But "[i]f that alone were sufficient to support a finding that strict scrutiny applies[,] a State would have to forego

its otherwise lawful option of forming districts on the basis of partisan choices." *Id.* And it would have to do so "only in one category of cases-where race correlates highly with partisan voting behavior," even though incumbency protection is "'a legitimate state goal'" and "'political gerrymandering' should not be subjected to strict scrutiny." *Id.* (quoting *Bush*, 517 U.S. at 964). "Therefore, where race and partisan voting behavior correlate highly, and a State draws a district with mixed political, racial, and other motivations, a district court may not merely seize on isolated evidence tending to show the State's racial motivation in drawing the district to conclude that race was the predominant factor." *Id.* 14-15.

Here, since no one disputes that District 3 directly serves Republican political interests better than any alternative, the finding of *racial* predominance is irreconcilable with *Cromartie II*. First, as if directly anticipating the decision below, *Cromartie II* held that a district court's "findings" concerning the challenged "district's shape, its splitting of towns and counties, and its high African-American voting population" "cannot, *as a matter of law*, support the District Court's judgment" where, as here, there is "undisputed evidence that racial identification is highly correlated with political affiliation." 532 U.S. at 243 (emphasis added). Since the majority's racial predominance conclusion exclusively rests on just those findings, it is legally deficient.

Second, *Cromartie II* rejected the VTD analysis by the plaintiffs' expert because of fundamental flaws identical to the flaws in Dr. McDonald's VTD analysis here. OB 46-49. Appellees do not dispute this or that Dr. McDonald's *and* Mr. Morgan's analyses establish

that the VTD swaps had a political effect indistinguishable from their racial effect. PB 39-41. (Thus, Appellees' criticisms of Mr. Morgan, *id.* 39; DB 54-59, are irrelevant, OB 48-49.)

Third, *Cromartie II* held that an alternative plan furthering the Legislature's "legitimate political objectives" is necessary to show that race predominates, but the majority failed to require one. 532 U.S. at 258. The majority originally justified this ruling on the irrational grounds that, absent "*trial testimony*" from legislators, it could not indulge in the "assumption" that the Republican-controlled Legislature wanted to re-elect Republican incumbents. OB 40-41. Subsequently, the majority clarified that it did not even analyze the political effect of Plaintiffs' Alternative Plan, but looked at it "simply to disprove the claim that the population swaps involving the Third Congressional District—and the resulting locality splits—were necessary to achieve population parity" (even though no one made any such claim). Mem. Op. 19 (DE 299).

1. Since they cannot satisfy *Cromartie II*'s burden of proving that race trumps politics, Appellees contend they *need not* satisfy it. This is purportedly because "direct evidence" establishes that race predominates over politics, since "partisan politics" was "permissive" and "subordinate to the mandatory criteria of compliance with the VRA." J.S. App. 32a-35a; PB 49-53; DB 33-38. This assertion is contrary to not only the precedent described above, but *Cromartie II's* express statement that such direct evidence "says little or nothing about whether race played a *predominant* role comparatively speaking." 532 U.S. at 253. That is why, in the face of such

direct evidence, *Cromartie II* overturned a finding of racial predominance based on defendants' expert's analysis of the correlation between race and politics in "swapped" VTDs (though the district court had deemed this analysis "unreliable" and "not relevant") and the weaknesses in plaintiffs' expert's analysis of that issue. *Id.* at 251-53. Thus, direct evidence of a racial motive does not justify failing to decouple race and politics because that is the only way to determine *which* predominated. OB 42.

Moreover, *Cromartie II* does not establish an unworkable rule whereby plaintiffs' obligation to disprove a political explanation turns on whether the direct evidence of racial purpose is sort-of-strong, strong or really strong. We nonetheless note that the "direct evidence" here is cognizably weaker than that in *Cromartie II*. There, the avowed purpose for creating the challenged district was to preserve the congressional delegation's "*racial* balance," without any potential Section 5 justification, by, *inter alia*, moving "Greensboro['s] Black community." 532 U.S. at 241. Here, Section 5 indisputably required preserving District 3 as a "black opportunity" district and the legislative history "inarguably" articulated "political" and "incumbency protection" "motive[s]." OB 26-28. There is certainly no *serious* difference between the direct evidence here and in *Cromartie II*, sufficient to provide courts with a manageable standard for determining whether the racial "direct evidence" is sufficient to obviate the requirement to disprove politics.

There is also nothing to Appellees' notion that *Cromartie II*'s reference to "case[s] such as this one" limited the obligation to present a politically

equivalent alternative to cases with some unidentified quantum of "direct evidence of a racial motive." PB 51-52. Rather, the reference is to cases "where the State has articulated a legitimate political explanation for its districting decision," 532 U.S. at 242, as *Alabama*'s citation of *Cromartie II* confirms, 135 S. Ct. at 1267.

Anyway, Plaintiffs *did* offer an alternative, which *contravened* the "legitimate political objective" of preserving all Republican incumbents. Surely *Cromartie II* precludes affirmance where plaintiffs' *own* alternative proves that the legislature's district was the *only way* to accomplish its "legitimate political objectives."

Indeed, plaintiffs' alternative in *Cromartie II*—the legislature's "interim" plan used in the 1998 elections—was "somewhat more compact" than the challenged district and created a "safe" "60%" "Democratic seat" that easily re-elected the black Democratic incumbent purportedly being "protected." 532 U.S. at 246-50. Thus, the alternative provided persuasive evidence that the legislature's *addition* of black voters to the district, to achieve a gratuitous "safe as possible" "*63%* reliably Democratic" district, "likely was driven by race, not politics." *Id.*

2. Since *no* alternative to Enacted District 3 fulfills the Legislature's political objectives, Appellees are forced to make the almost-comical argument that the Legislature had *no political objective* and was *indifferent* to sacrificing a Republican incumbent. PB 41-47. But, as the Opening Brief established and Appellees cannot refute, the notion that the Republican Legislature was uniquely masochistic is

contrary to the majority's finding that it was "inarguably" "motivated" by "partisan politics" and "protecting incumbents," as well as the legislative history and the uniform commentary by the Legislature's Democrats, contemporaneous news accounts and Plaintiffs' expert. OB 35-36.

The majority's finding that politically "protecting incumbents" "inarguably" motivated the Legislature is not undermined by Appellees' cherry-picking of discovery responses (never mentioned by the majority) or their assertion that Janis had to *personally* analyze "partisan performance" statistics because the incumbents whose recommendations were scrupulously followed provided only politics-free input on "communities of interest." PB 42-44. First, "communities of interest" in Virginia include communities based on "*political* beliefs, *voting* trends and *incumbency* considerations." JA98 (emphasis added).

Moreover, the answer to all those counter-intuitive assertions appears on the page immediately preceding Janis' "partisan performance" statement, where a Democratic Senator reveals that "the Cook Report published" a map "several weeks ago" establishing that the "eleven" "congress people" had "come to an agreement" on a map "eerily close to the" Janis plan. JA455. Thus, absent an unbelievable coincidence where Janis *independently* developed a plan "eerily close to" that drawn earlier by the "congress people," the inescapable inference is that Janis merely *confirmed* that the *congressionally-developed* map reflected the members' desires for their districts.

3. Finally, Appellees repeatedly assert that the Legislature used "race as a proxy" for politics, but the majority did not and could not make any such finding. PB 47-49; DB 47-53. Again, the whole point of *Cromartie I* and *Cromartie II* is that a *Shaw* claim fails where, as here, the districts would make "perfect sense" politically absent race, because "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

4. Thus, the decision below must be overturned because of its multiple legal errors, regardless whether its factual conclusions were "clearly erroneous." While the majority "found" that "race predominated," that finding was premised on its legally erroneous "hierarchy" notion and, as just described, was both based on facially improper evidence and unsupported by legally required evidence.

Anyway, the majority's finding "is no stronger than the evidence that underlies it." *Cromartie II*, 532 U.S. at 249. Because *Plaintiffs'* evidence and the *undisputed* facts contradict the notion that race trumped politics, the majority's predominance finding is clearly erroneous, particularly since "there is no intermediate court of review" here and the "not lengthy" trial "consisted [exclusively] of documents and expert testimony." *Id.* at 242. Whether viewed as a case of "clearly erroneous" fact-finding or legal error, *Cromartie II's* reversal of a racial predominance finding where the political predominance evidence was far weaker than here

compels reversal. Since "[o]ur legitimacy requires . . . adhere[nce] to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds," there cannot be a different rule for Republican incumbents than that established for Democratic incumbents in *Cromartie II*. *Bush*, 517 U.S. at 985 (plurality).

IV. THE LEGISLATIVE HISTORY REFUTES PLAINTIFFS' CLAIM

Even assuming that a BVAP floor with no effect on district lines establishes a presumptive *Shaw* violation, the majority still committed legal error. It held that race predominated because "compliance with Section 5 was [the Legislature's] predominant purpose," that "avoidance of retrogression in the Third Congressional District took primacy over other redistricting considerations because it was '*nonnegotiable*,'" that the Legislature's "principal focus" was "to ensure that there be no retrogression," and, most directly, that protecting incumbents was not predominant because this "goal was 'permissive' and subordinate to the mandatory criteria of [Section 5] compliance." J.S. App. 2a, 17a-19a, 21-23a, 33a-34a.

Both the State Appellees and the government concede that this is legal error because a redistricting plan's drafter's "preference for federal [VRA law] over state law" does "not raise an inference of intentional [racial] discrimination; it demonstrates obedience to the Supremacy Clause." *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (reversing finding of racially discriminatory redistricting as clearly erroneous); DB 37-38; GB 21. But they try to retroactively correct

this error by pretending that the majority found racial predominance because Janis improperly *implemented* the no-retrogression mandate by refusing to diminish BVAP. DB 35-38; GB 21-22. This revisionist history is demonstrably false: the majority *uniformly* stated that race "was the legislature's predominant purpose" because "compliance with Section 5" was "nonnegotiable," J.S. App. 20a n.15; *id.* 2a, 21a-23a, not because the Legislature *improperly* complied with Section 5. Indeed, the majority affirmatively refused to "parse legislative intent in search of 'proper' versus 'improper' motives underlying the use of race" because "[t]he fact that the legislature considered race a predominant concern *only* because it believed federal law compelled it to do so is of *no current legal consequence*." *Id.* 17a-18a & n.13 (emphasis added).

Equally obviously, Janis' reference to "not having *less*" than Benchmark District 3's *53.1%* BVAP *contradicts* the majority's invented notion of some *55%* BVAP floor. Since the Opening Brief refuted any claim that the 2012 Legislature erected such a floor, Appellees are forced to invoke the *2011* legislative history regarding state legislative districts. *See* PB 27-30; DB 33-38. But this evidence from a different legislature about different redistricting plans is so unprobative that not even the majority referenced it. Anyway, Appellees' new argument *supports* Morgan's inference that 55% BVAP was an "appropriate" (not *necessary*) option due to bi-racial support because it cites *black Democrat* Delegate Dance's assertion that this was the "minimum BVAP" needed to keep a black district "performing," JA 517-19; PB 29, and *refutes* any 55%

BVAP floor because that very Senate plan contained less-than-55% districts, PB 55.

Indeed, Janis' two references to not *reducing* District 3's *53.1%* BVAP directly support the conclusion that the Enacted Plan's *increase* of District 3's BVAP to *56.3%* had nothing to do with Janis' views on avoiding retrogression and everything to do with neutral incumbency-protection and political objectives. Since 53.1% BVAP would perfectly implement any "no diminution" policy, there was no "racial" reason to reject it. The only reason for rejecting it is the same reason the Legislature had for rejecting Plaintiffs' *50%* BVAP option—it would not protect incumbents to the same extent as the 56.3% alternative.

Thus, in this context, not diminishing BVAP below the *benchmark* level is no more racial than Section 5's requirement of not diminishing BVAP below the "minority percentages [needed] to maintain the minority's present ability to elect the candidate of choice." *Ala.*, 135 S. Ct. at 1274. Both options erect a mandatory BVAP floor and therefore are equally "racial." Indeed, *all* the alternatives with BVAPs below the Benchmark BVAP were *more* racial because all subordinated the neutral core-preservation principle while either concededly adhering to a 50% BVAP "quota" (Plaintiffs' Alternative), or severely diminishing District 3's BVAP to create *two* "black" districts (the Senate Democrats' Locke plan and the remedial plan) to achieve greater racial proportionality in a 19.7% black state. JA 148, 686-87; Final Report 29-65 (DE 272) ("Rep.").

V. THE MAJORITY MISAPPLIED STRICT SCRUTINY

1. While *increasing* District 3's BVAP was not *necessary* to garner preclearance, it remains undisputed that the Enacted Plan was the *best* way to minimize any tension between Section 5 and the Legislature's most important neutral principles. *See supra* Parts I-IV. *Shaw* does not require the *lowest possible* Section 5-compliant BVAP, especially not in preference to the level that best complies with traditional principles.

2. Appellees contend that a racial voting analysis would have allowed the Legislature to reduce District 3's BVAP. PB 53-56; DB 63-71; GB 33-34. But a voting analysis *designed to reduce BVAP* serves no *Shaw* purpose where, as here, any reduction *exacerbates* conflict with neutral principles. Anyway, the Legislature had "good reason" to believe any serious reduction in BVAP, particularly below 50%, would create daunting or insurmountable burdens to *proving* nonretrogression under the 2006 Amendment to Section 5. *Ala.*, 135 S. Ct. at 1274; OB 53-56. Thus, adhering to the Benchmark BVAP was the best way to prove nonretrogression. OB 53-56.

First, any reduction below 50% would mirror the Section 5 strategy upheld in *Georgia v. Ashcroft*—but the point of the 2006 Amendment was to overturn *Georgia* because it "misconstrued and narrowed the protections offered by Section 5." 52 U.S.C. § 10301 note, Findings (b)(6); *see Georgia v. Ashcroft*, 539 U.S. 461, 470, 487 (2003) (Georgia "unpacked" the most concentrated majority-minority districts to create new districts with BVAPs slightly above and below

50%). This is particularly true of a reduction to 41% BVAP because even proponents described that option as reducing District 3 to a "minority-*influenced*" district, JA395-97—precisely the result foreclosed by the 2006 Amendment's prohibition against "*diminish*[*ing*]" minorities' "ability" "to *elect*." 52 U.S.C. § 10304(b) (emphasis added). (This is presumably why even Plaintiffs' Alternative refused to reduce BVAP below 50%.)

Relatedly, no voting analysis could *prove* that a BVAP reduction did *not* diminish minorities' ability to elect because such analyses here are inherently unpersuasive and prove far too much. As established by *all* racial bloc voting analyses performed during the liability and remedial phases, the endogenous elections in District 3 prove nothing since they were *de facto* or *de jure* uncontested, and the only black-white contests before 2012 in the inherently less probative exogenous elections, *Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986), involved President Obama, who won in Virginia—with a 19.7% BVAP—and District 11, with a *12.3%* BVAP. JA131-35; Rep. 33-34. Any such "analysis" therefore dramatically understates the BVAP needed to elect an unknown black candidate in District 3.

Dr. McDonald's and the special master's analyses also fail to ask the right question under Section 5: whether the changes "*diminish*[]" the "ability to elect." Since Benchmark District 3 was an incredibly safe district with a *99%* chance of black success, reducing it to an "*equal* opportunity" district with a *50%* chance of success, Rep. 25, 29, 35-36, is an extraordinary 49% *diminishment* in "the minority's present ability to elect." *Ala.*, 135 S. Ct. at 1274.

Dr. McDonald's and the special master's analyses also prove too much because they purportedly show that a "*less than 30%*" BVAP avoids retrogression. PB 55-56 (emphases added); Rep. 29-65. But DOJ has *never* precleared such a dramatic reduction, and the Obama election "evidence" would be rejected as facially anomalous, which is why both Plaintiffs' Alternative and the remedial plan erect artificial BVAP floors *well above* this alleged ability-to-elect level. Rep. 44-52.

The government attempts to mislead the Court on this point, suggesting that it would have blithely accepted a reduction from 53.1% BVAP because District 3 "was precleared in 1998 with a BVAP of 50.47%." GB 34. But the 50.47% BVAP was a *13% increase* over the *37%* benchmark BVAP in "the last legally enforceable" district (the 1992 plan was invalidated in *Moon*). JA550; Pl.Tr.Ex. 23 at 26. Moreover, it precleared District 3 in 2002 with a nearly 3% BVAP increase to *53.2%*, giving the Legislature every reason to believe that a 3% BVAP increase in 2012 was "appropriate."

DOJ's actual practice also shows the difficulty of obtaining preclearance if minority percentages are reduced. For example, in Texas, notwithstanding the State's retrogression analysis, DOJ, because of *diminished* electoral *success*, successfully opposed *increases* in Hispanic citizen voting-age population (House District 117-58.8% to 63.8%; congressional District 23-58.4% to 58.5%) and a small decrease (HD 35-54.6% to 52.5%), and even unsuccessfully challenged a decrease from 77.5% to *72.1%* (HD41). *Texas v. United States*, 887 F. Supp. 2d 133, 154-55, 168, 238 (D.D.C. 2012) (three-judge court), *vacated*,

133 S. Ct. 2885 (2013).

VI. APPELLANTS HAVE STANDING

Contrary to Plaintiffs' and the government's contention, Appellants need not show that they *will* lose re-election or have a "right" or "legally cognizable interest" in not suffering the injury inflicted by the order below. PB 16-17; GB 13. Rather, it suffices that the order diminishes Appellants' "*chances* for reelection." *Meese v. Keene*, 481 U.S. 465, 474 (1987)[2]; *Bush v. Gore*, 531 U.S. 98 (2000); *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993). As the government recognizes, there is cognizable injury if the challenged action provides *less* "opportunity to compete in an election." GB 16. If the remedial plan's transformation of District 4 from a 48% to 60% Democratic district is not sufficient diminution of electoral opportunity, nothing is. Rep. 45, 52.

Defendant-appellants, moreover, need not show infringement of a legal "*right*" because their electoral "injury *in-fact*" creates a "direct stake in the outcome," regardless whether the injury constitutes a legal violation. *Diamond v. Charles*, 476 U.S. 54, 66 (1986). Indeed, *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), and *Swann v. Adams*, 385 U.S. 440 (1967), prove as much. OB 57-63. The *Swann* appellants *concededly* had no right to, but merely preferred, "different treatment" of their district. 385 U.S. at 443; *see Elec. Fittings Corp. v. Thomas & Betts Co.*,

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[2] *Meese's* reference to "*harm [to] chances for reelection,*" establishes that *reputational* harm was not the basis for standing. 481 U.S. at 474 (emphasis added).

307 U.S. 241, 242-43 (1939) (*prevailing* defendant had standing to appeal because the judgment might impair success in unspecified future litigation). For this reason, the standing requirements for *Shaw plaintiffs* established in *United States v. Hays*, 515 U.S. 737 (1995), PB 11-13; GB 17-18, are inapposite, OB 60-63.

Plaintiffs' contrary view would irrationally foreclose incumbents from appealing judgments that *paired* them in the same district because incumbents have no "right" to avoid pairing and could move to a different district.[3]

Finally, the government's contention that Appellants bear a "particularly difficult" burden because the State "has acquiesced" in the judgment is precisely backwards. GB 17. Closing the courthouse doors based on state acquiescence would grant

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[3] For this reason, Appellants' standing is unaffected by Appellant Forbes' announcement of his candidacy in District 2. *See* Rachel Weiner, "Randy Forbes To Run In Different District Thanks To New Map," WASHINGTON POST, Feb. 8, 2016. That the remedial plan forced Appellant Forbes to choose between facing certain defeat in a super-majority-Democratic District 4 and running in District 2 is sufficient injury-in-fact to confer standing. That is particularly true because Appellant Forbes obviously would have preferred to run in Enacted District 4, where he has long resided and enjoys a substantial incumbency advantage. *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (standing where "but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision"); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 67 (1990) (employee challenging political-based employment decisions could sue despite securing lower-paying position through political-related activity).

politically motivated attorneys general veto power over state legislative enactments, and the Commonwealth here *agrees* that Appellants have standing. DB 28-33.

CONCLUSION

The Court should reverse the judgment below.

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February 26, 2016

No. 15A-724, No. 14-1504

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Applicants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Respondents.

Application From The United States District Court For The Eastern District of Virginia

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REPLY IN SUPPORT OF APPLICATION FOR STAY OF REMEDIAL PLAN PENDING RESOLUTION OF DIRECT APPEAL OF LIABILITY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. PLAINTIFFS' AND DEFENDANTS' OPPOSITIONS CONFIRM THAT THE MAJORITY'S UNPRECEDENTED, PREMATURE, AND OVERBROAD REMEDY WARRANTS A STAY 4

II. THE MAJORITY LACKED JURISDICTION TO ENTER THE REMEDIAL PLAN 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 5, 6

Ala. Leg. Black Caucus v. Ala.,
135 S. Ct. 1257 (2015) 3, 12, 13

Branch v. Smith,
538 U.S. 254 (2003) 5, 6

Donovan v. Richland County Ass'n,
454 U.S. 389 (1982) 15

Easley v. Cromartie,
532 U.S. 234 (2001) 13

East Carroll Parrish School Bd. v. Marshall,
424 U.S. 636 (1976) 15

Giles v. Ashcroft,
193 F. Supp. 2d 258 (D.D.C. 2002) 5

Hollingsworth v. Perry,
558 U.S. 183 (2010) 4, 12

Johnson v. Mortham,
926 F. Supp. 1540 (N.D. Fla. 1996) 6

Karcher v. Daggett,
455 U.S. 1303 (1982) (Brennan, J) ..... *passim*

Karcher v. Daggett,
462 U.S. 725 (1983) 5

Karcher v Daggett,
466 U.S. 910 (1984) 5

Kirkpatrick v. Preisler,
390 U.S. 939 (1968) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Kokkonen v. Guardian Life Ins. Co.,
511 U.S. 375 (1994) 17

Larios v. Cox,
305 F. Supp. 2d 1335 (N.D. Ga. 2004), *summ. aff'd*, 542 U.S. 947 (2004) 6, 17

Miller v. Johnson,
515 U.S. 900 (1995) 5

NLRB v. Cincinnati Bronze, Inc.,
829 F.2d 585 (6th Cir. 1987) 16

Reynolds v. Sims,
377 U.S. 533 (1964) 6, 7

Roberts v. Colorado State Bd. of Agric.,
998 F.2d 824 (10th Cir. 1993) 16

Travia v. Lomenzo,
381 U.S. 431 (1965) 5

United States v. Locke,
471 U.S. 84 (1985) 15, 17

United States v. Wells Fargo Bank,
485 U.S. 351 (1988) 15, 17

Whitcomb v. Chavis,
396 U.S. 1064 (1970) ..... *passim*

White v. Weiser,
412 U.S. 783 (1973) ..... *passim*

WMCA, Inc. v. Lomenzo,
377 U.S. 633 (1964) 5

OTHER AUTHORITIES

Fed. R. Civ. P. 62(c) 16, 17

Plaintiffs' and Defendants' Oppositions dramatically confirm that the Court should stay the majority below's unprecedented remedial plan pending the Court's plenary review of liability and allow the 2016 election to proceed under the Legislature's Enacted Plan. Plaintiffs and Defendants do not dispute *any* of the facts demonstrating that any reversal of liability here will create extraordinary confusion and burdens on voters, candidates, and election officials. Specifically, Plaintiffs and Defendants do not dispute that Virginia must begin preparing ballots for the June 14 primary elections on April 1 and mail those ballots no later than April 30 in order to comply with the federal Military and Overseas Voter Empowerment ("MOVE") Act. Plaintiffs and Defendants also do not dispute that this Court will not hold oral argument in the liability appeal until March 21 *at the earliest*. *See* App'n 16-23.

Consequently, it cannot be seriously disputed that:

- Any reversal of the liability judgment will occur *after* Virginia has incurred the substantial and irretrievable expense of printing and sending out ballots for the vacated remedial districts, and will require Virginia to *duplicate* those costs for the restored Enacted Districts.
- Under the MOVE Act, any reversal by this Court *at any time* will require postponing the June 14 primary.
- Any reversal after June 9 will almost certainly require postponing the general elections in the five affected districts *past the nationwide November 8 Election Day* in this presidential election year.

- Any post-June 14 reversal will also require *redoing* the entire primary cycle and the primary elections.
- Any reversal will thwart any effort to elect Virginia's second black congressional representative in remedial District 4, in the middle of the election cycle or even after a June 14 primary victory.

See id.

Unable to deny the calamitous consequences of a liability reversal, Plaintiffs and Defendants nonetheless maintain that a stay is unwarranted because they contend such consequences are unlikely to eventuate because the Court is likely to affirm liability. *See* Pl. Opp. 14-23; Def. Opp. 13-27. There are four fatal flaws in this argument.

First, the fact that the Court has granted plenary review means that there is at least *some* prospect of reversal—and any such prospect is simply too high given the extraordinary injury that the Commonwealth, its voters, and its candidates undisputedly will suffer if that risk eventuates. *Second*, the mere *prospect* of reversal imposes *current* injury even if liability is ultimately affirmed. Such uncertainty forces candidates to conduct a two-front campaign in *both* the Enacted and remedial districts—which necessarily severely burdens candidates' campaigns and will inevitably create mass confusion among the *more than one million Virginians* who currently reside in different remedial districts than their districts under the Enacted Plan. *Third*, this Court's precedent has "repeatedly emphasized" that the "balance of equities," standing alone, weighs heavily in favor of conducting

elections under "plans created by the legislature" rather than "judicially constructed plans" where liability has not been finally resolved by this Court, even where, as in *Karcher*, an affirmance is likely (and ultimately entered). *Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982) (Brennan, J); *see also Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (Mem.); *White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (Mem.).

Fourth, Plaintiffs and Defendants badly miscalculate the likelihood of a reversal. Plaintiffs and Defendants claim that the majority's finding of racial "predominance" can be reversed only for clear factual error. *See* Pl. Opp. 14-23; Def. Opp. 13-27. They therefore overlook—and *repeat*—the majority's fundamental and reversible *legal* errors. *See* Pl. Opp. 14-23; Def. Opp. 13-27. Simply put, like the majority, Plaintiffs and Defendants cannot identify *any* conflict between race (or the alleged 55% BVAP "floor") and either Republican political goals or the neutral principles the Legislature applied to all eleven districts—protecting incumbents by largely preserving the cores of existing districts. *See* Pl. Opp. 14-23; Def. Opp. 13-27; App'n 32-33; Br. For Appellants 25-53. Consequently, the straightforward legal issue on appeal is whether a *Shaw* violation occurs where "race" is fully consistent with politics and the generally applied neutral principles, thus precluding race from "subordinating" those neutral policies or "significantly affect[ing]" the challenged district's shape or demographics. *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1270-71 (2015); App'n 32-33; Br. For Appellants 25-53. The majority's notion that such subordination can occur absent such an inconsistency is plain legal error. And

Plaintiffs' and Defendants' sole argument for inconsistency between race and politics is that the Legislature did not *want* to retain Republican incumbents. *See* Pl. Opp. 14-23; Def. Opp. 13-27. This assertion not only is facially absurd, but also is at war with the majority's factual finding that "partisan politics" and "protecting incumbents" "inarguably" "motivated" the Legislature in drawing District 3. J.S. App. 31a. Plaintiffs' and Defendants' selective repudiation of the majority's factual findings cannot mask the majority's legal errors or the fair prospect of reversal here. The Court should follow its established practice, stay the remedial plan, and allow the 2016 elections to proceed under the Enacted Plan.

I. PLAINTIFFS' AND DEFENDANTS' OPPOSITIONS CONFIRM THAT THE MAJORITY'S UNPRECEDENTED, PREMATURE, AND OVERBROAD REMEDY WARRANTS A STAY.

Plaintiffs' and Defendants' Oppositions do not even respond to—let alone rebut—Applicants' showing of "a likelihood that irreparable harm will result from the denial of a stay"; that the "equities" and "weigh[ing] [of] relative harms" favor a stay; and of "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); App'n 16-37.

1. As to precedent, Plaintiffs and Defendants cannot cite a single case where a remedy has been entered during this Court's liability review or distinguish the Court's "repeated[]" holdings emphasizing that the "the balance of equities" strongly favors conducting elections under "plans created by the legislature" rather than "judicially constructed plans" while liability remains unsettled. *Karcher*, 455 U.S. at 1306-07 (Brennan, J.); *see also Whitcomb*, 396 U.S. 1064 (Mem.); *White*, 412

U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.); *see* Pl. Opp. 14-23; Def. Opp. 13-27. Plaintiffs and Defendants cite inapposite cases where federal courts "order[ed] implementation of a remedial redistricting plan while an appeal was pending before this Court." Pl. Opp. 12; Def. Opp. 32-36. But *none* of these decisions involved a three-judge court *entering* any remedy when, as now, this Court was actively considering liability on plenary review.

In fact, in all but two of those decisions, liability either already had been finally established by a *prior* appeal to this Court or was not contested. Thus, these cases support only the entirely different proposition that a court may stay a remedy for a proven violation pending a successive appeal of the *remedy*. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 77 (1997) (liability established in *Miller v. Johnson*, 515 U.S. 900 (1995)) (cited at Def. Opp. 35); *Travia v. Lomenzo*, 381 U.S. 431, 432 (1965) (liability established in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964)) (cited at Pl. Opp. 12); *Branch v. Smith*, 538 U.S. 254, 258 (2003) (impasse case where equal-population violation not contested) (referred to in *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 261 (D.D.C. 2002) (cited at Pl. Opp. 13 n.4)); *Karcher v Daggett*, 466 U.S. 910 (1984) (liability established in *Karcher v. Daggett*, 462 U.S. 725 (1983)) (cited at Def. Opp. 35 n.161). In such cases, there is no possibility of using a plan "created by the legislature," since the only issue is what judicial remedy should be used.[1] In the

[1] Moreover, the Court never found "substantial questions" but instead summarily affirmed the judicial remedies in two of these appeals, *see, e.g.*, *Travia*, 381 U.S. 431, *summ. aff'd*, *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965); *Karcher*, 466

two cases where liability had not previously been established, there was no opportunity for a reversal on liability because there was no appeal of liability, *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (cited at Pl. Opp. 13 n.4 and Def. Opp. 32, 35), or this Court had denied the appeal and summarily affirmed. *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004), *summ. aff'd*, 542 U.S. 947 (2004) (cited at Pl. Opp. 12-13 and Def. Opp. 34).

Plaintiffs and Defendants also cite the Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), *see* Pl. Opp. 1; Def. Opp. 32, 36, 39, but that also was not a case in which the Court's plenary review of liability would be completed in the middle of an ongoing election cycle, *see* 377 U.S. at 585. Moreover, the Court recognized in *Reynolds* that "equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Id.* Those considerations include "the proximity of a forthcoming election and the mechanics and complexities of . . . election laws" and the need to "avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State." *Id.* Thus, *Reynolds* is entirely consistent with this Court's "repeated[]" "balanc[ing] of the equities" in

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(continued...)
U.S. 910, *summ. aff'd*, 467 U.S. 1222 (1984), and did not complete its review of the two other remedial appeals until *after* the election, *see Abrams*, 521 U.S. at 74; *Branch*, 538 U.S. at 258. Thus, these cases have no application here, where the Court has found substantial questions on liability and its review will be completed mid-cycle.

cases where its plenary review of liability remains pending, *Karcher*, 455 U.S. at 1306-07 (Brennan, J.), particularly when its liability decision will issue in the middle of the election cycle and any reversal of a judicial remedy would unleash "unreasonable [and] embarrassing" electoral chaos on the Commonwealth, *Reynolds*, 377 U.S. at 585; App'n 16-23.

2. Plaintiffs and Defendants do not dispute that any liability reversal will require moving 1,111,088 people back to the Enacted Districts in the middle of an election cycle and will unleash electoral chaos on the Commonwealth's voters, candidates, and election officials. *See* Pl. Opp. 23-30; Def. Opp. 32-37. Thus, all parties *agree* that, absent a stay, the majority's remedial plan subjects Virginia to an extraordinary—and unprecedented—risk of mass voter confusion, an immense waste of taxpayer and private resources, postponement of the primary elections, and, depending on the timing of the reversal, even *postponement of congressional general elections* until *after* the nationwide November 8 Election Day in this presidential election year. App'n 16-23. And all parties agree that these consequences would be especially significant for candidates whose campaigns for the new electoral opportunities afforded by the remedial plan would be rendered nugatory by a mid-cycle reversion to the Enacted Plan, including a black candidate of choice mounting a historic campaign in remedial District 4 to become Virginia's second black congressional representative. *See id.*

Plaintiffs and Defendants do not even attempt to offer any reason why the Court should countenance these harms on the Commonwealth and its voters.

Instead, they attempt to change the subject and argue that the Court may not even *consider* these harms, but instead must myopically focus only on the irreparable harms to Applicants. *See* Pl. Opp. 23-30; Def. Opp. 27-32. This is flatly incorrect: any consideration of the "balance of equities" necessarily requires consideration of the public interest. *Karcher*, 455 U.S. at 1306-07 (Brennan, J.); *see also Whitcomb*, 396 U.S. 1064 (Mem.); *White*, 412 U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.). Plaintiffs and Defendants recognize as much because they argue that "the public interest" weighs in favor of their position. *See* Pl. Opp. 30-32; Def. Opp. 32-37. Thus, as Applicants have explained, the public interest in avoiding electoral chaos, widespread voter confusion, and irretrievable waste of taxpayer resources weighs heavily in favor of a stay. *See* App'n 16-23.

In all events, even the specific harms to Applicants constitute "irreparable injury" warranting a stay. App'n App. B at 34-36 (Payne, J., dissenting). In fact, Plaintiffs do not even try to dispute that the remedial plan irreparably harms Republican Applicant Randy Forbes's re-election prospects. *See* App'n 25-26; Pl. Opp. 23-30. Nor could they: the remedial plan transforms District 4 from a 48% Democratic district into a 60.1% overwhelmingly majority-Democratic district by moving nearly 47.9% of Enacted District 4's current population into other districts and replacing it with new voters. *See* App'n 25-26. Thus, Defendants' half-hearted attempt to suggest that Applicant Forbes might be able to win re-election in remedial District 4 because he won re-election in Enacted District 4, *see* Def. Opp. 30-31, ignores the remedial plan's substantial overhaul of District 4 and destruction

of Applicant Forbes's incumbency advantage. *See* App'n 25-26.

3. Plaintiffs and Defendants also do not dispute that the majority's unprecedented and premature remedy already has imposed a "two-front" campaign on Virginia, its voters, and its candidates. *See* Pl. Opp. 27-30; Def. Opp. 27-32; App'n 23-27; App. B at 34-36 (Payne, J., dissenting). This two-front campaign alone warrants entry of a stay because—as the majority never disputed—it "presents a realistic, serious, and immediate threat of confusion for candidates and constituents alike." App. B at 35 (Payne, J., dissenting); App'n 23-27. Indeed, the more than one million Virginians the majority has placed in limbo will inevitably become confused by being the targets of two campaigns featuring two sets of candidates, particularly when one campaign and slate of candidates is automatically removed mid-cycle by any liability decision from this Court. *See* App'n 23-27. Moreover, the parallel campaigns "make[] considerable added expense to all candidates, both incumbents and challengers, a certainty." App. B at 35 (Payne, J., dissenting). Funding and running two different campaigns in two different districts with different opponents and potentially different issues is a "heavy" burden that "*could affect the results of an election* by diverting scarce resources to a district that ultimately was not called for by the Supreme Court's decision." *Id.* at 36 (emphasis added); *see* App'n 23-27.

Plaintiffs and Defendants cannot deny any of this, but simply blithely note that Applicants can avoid the duplicative costs of conducting parallel campaigns if they choose to campaign *only* in either the Enacted District or the remedial district. *See* Pl. Opp. 27-30; Def. Opp. 27-32. But any such cost savings will necessarily

jeopardize their re-election prospects by limiting their campaigning to an electorate that may not be the one ultimately casting the votes. Thus, the remedial plan necessarily injures Applicants by forcing on them the Hobson's Choice of incurring the additional cost of campaigning in both the Enacted and remedial districts or running the risk of losing the election by limiting their campaigning to only the Enacted (or remedial) district. *See* Pl. Opp. 27-30; Def. Opp. 27-32.

4. In addition to citing the inapposite case law discussed above, *see supra* pp. 4-7, Plaintiffs and Defendants repeat the majority's contentions that a remedial plan is immediately required because Plaintiffs' "right to vote" is at stake, Plaintiffs already have gone through two elections in Enacted District 3, the public has "an interest" in holding elections under a constitutional plan, and, for some undisclosed reason, it would be "easier" for Virginia to change from the remedial plan to the Enacted Plan mid-cycle than from the Enacted Plan to the remedial plan. *See* Pl. Opp. 30-32; Def. Opp. 32-36. But, as explained, the right to vote, the public interest in constitutional elections, and the (alleged) relative ease of switching plans have been present in *all* prior cases in which the Court has granted stays pending its plenary review—and the Court has "repeatedly emphasized" that these factors do not change the "balance of equities" that requires a stay in these circumstances. *Karcher*, 455 U.S. at 1306-07 (Brennan, J); *see also Whitcomb*, 396 U.S. 1064 (Mem.); *White*, 412 U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.).

Plaintiffs and Defendants fall back on arguing that "switch[ing] from the enacted plan to the remedial plan" mid-cycle upon any affirmance of liability by this

Court would also cause "electoral 'chaos.'" Pl. Opp. 31-32; Def. Opp. 36. Applicants wholeheartedly agree: for that very reason, the Court has "repeatedly emphasized" that "judicially constructed plans" should be stayed in favor of "plans created by the legislature" so that *no* change in plan occurs in the middle of an election calendar. *Karcher*, 455 U.S. at 1306-07 (Brennan, J); *see also Whitcomb*, 396 U.S. 1064 (Mem.); *White*, 412 U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.). Indeed, as Applicants have explained, *any* mid-cycle change in plan would be disastrous for the Commonwealth's voters, candidates, and election officials. *See* App'n 16-27. And the *only* way to ensure that there will be no mid-cycle change in redistricting plan is to follow the Court's established practice and allow the 2016 elections to proceed under the Legislature's Enacted Plan because the federal courts cannot impose the remedial plan on the Commonwealth if the Court reverses the liability judgment.

Moreover, as explained, Plaintiffs have no one but themselves to blame for the timing of this lawsuit and the remedy. *See* Pl. Opp. 1-2; App'n 27-31. Plaintiffs did not file suit until 21 months after the Legislature adopted the Enacted Plan and 11 months after it was used in the 2012 elections—and Plaintiffs are "largely responsible" for the fact that the three-judge court could not enter a remedy in time for the 2014 elections. App. B at 13 n.7; *see also id.* at 37 (Payne. J., dissenting). Thus, the *only* question is whether the Court should grant a stay of the remedial plan for the first election in which Plaintiffs' suit was even arguably timely, where its plenary review of liability is ongoing. Particularly in the circumstances presented here—where suit was instigated not by concerned citizens but by the

"National Democratic Redistricting Trust," *id.* at 40-41 (Payne, J., dissenting)—the Court should follow its established practice and grant the stay, *see* App'n 27-31.

5. Finally, there is "a fair prospect that a majority of the Court will vote to reverse" the majority's flawed liability judgment and, thus, vacate the remedial plan. *Hollingsworth*, 558 U.S. at 190. The Court's grant of plenary review of the liability decision signals at least a prospect of reversal. *See* App'n 31-37; Br. For Appellants 14-63. And the majority committed a host of glaring legal errors in transforming a *Shaw remedy* into a *Shaw violation*, each of which independently warrants reversal. *See* App'n 31-37; Br. For Appellants 14-63.

First—despite Applicants' repeated invitations to do so—neither the majority, Plaintiffs, nor Defendants have identified *any* conflict between race and the neutral incumbency-protection, core-preservation, and political principles that "inarguably" "motivated" the Legislature in drawing District 3. J.S. App. 31a; App'n 31-37; Br. For Appellants 25-53; Pl. Opp. 10-23; Def. Opp. 13-27. For this reason alone, Plaintiffs failed to carry their "demanding" burden to show that race *subordinated* neutral principles and "significant[ly] affected" or "change[d]" District 3's boundaries. *Ala.*, 135 S. Ct. at 1270-71; App'n 31-37; Br. For Appellants 25-53. The majority's insistence on finding a *Shaw* violation in the absence of that required showing alone is reversible legal error. *See* App'n 31-37; Br. For Appellants 25-53.

Plaintiffs' and Defendants' invocation of the entirely fictitious "55% BVAP floor," *see* Pl. Opp. 10-23; Def. Opp. 13-27, confirms, rather than refutes, this error. In the first place, as Applicants have explained, the alleged BVAP floor is entirely a

figment of the majority's imagination. *See* Br. For Appellants 43-46. But in all events, even if the Legislature had announced that it would not allow District 3's BVAP to go below 55%, this would not suggest—much less satisfy Plaintiffs' "demanding" burden to show—that race *predominated* over traditional principles. *Easley v. Cromartie*, 532 U.S. 234, 241, 253 (2001) (*Cromartie II*); Br. For Appellants 29-30. Rather, Plaintiffs still would be required to show that this purported racial floor *conflicted* with the Legislature's traditional districting priorities—a showing that neither Plaintiffs nor Defendants so much as *attempt* to make. *See* Br. For Appellants 29-30, 43-46; *Ala.*, 135 S. Ct. at 1270-71; *see also* Pl. Opp. 10-23; Def. Opp. 13-27.

Second, Plaintiffs and Defendants do not dispute that the majority failed to enforce the Court's directive as to *how Shaw* plaintiffs must show racial predominance. Plaintiffs and Defendants do not dispute that the majority never required Plaintiffs to offer an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred "traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. *Cromartie II*, 532 U.S. at 258; Pl. Opp. 10-23; Def. Opp. 13-27. And Plaintiffs and Defendants do not dispute that Plaintiffs' Alternative Plan fails that requirement because, as Plaintiffs' expert Dr. McDonald testified, the Alternative Plan "subordinates traditional districting principles to race" to achieve a "50%" black "quota" and performs "significant[ly] worse" than the Enacted Plan on the Legislature's race-neutral priorities. JA 686-87, 889-90; *see* App'n 31-37; Br.

For Appellants 39-43; Pl. Opp. 10-23; Def. Opp. 13-27.

Third, Plaintiffs and Defendants fail to rehabilitate the majority's finding of a *Shaw* violation where the Legislature *minimized* the conflict between race and its neutral political goals by adopting the *only* plan presented at the time or in litigation that both complies with Section 5 and preserves the 8-3 partisan split in favor of Republicans. *See* App'n 34-35; Br. For Appellants 53-57; Pl. Opp. 10-23; Def. Opp. 13-27.

Rather than meeting the majority's legal errors head-on, Plaintiffs and Defendants principally argue that the majority's "finding" of racial predominance is reviewable only for clear factual error. Pl. Opp. 10-23; Def. Opp. 13-27. But the majority's findings of "predominance" rested on its legally erroneous notion that predominance is *ipso facto* established because the "non-negotiable" federal Voting Rights Act "predominates" over discretionary state law neutral principles. *See* J.S. App. 2a, 21a-23a; Br. For Appellants 28-32. It does not rest on the legally required basis; *i.e.*, that there is some *conflict* between race and politics or traditional districting principles where race "predominates" over these neutral interests. And Plaintiffs' and Defendants' post-hoc effort to *create* a conflict by arguing that preserving District 3's BVAP was *contrary* to the Legislature's masochistic desire to have *fewer* Republican incumbents flies in the face of the majority's factual finding that "protecting incumbents" and "partisan politics" "inarguably" "motivated" the Legislature in drawing Enacted District 3 (as well as common sense). J.S. App. 31a; *see* App'n 31-37; Br. For Appellants 25-53. Plaintiffs' and Defendants' position thus

requires the Court to overlook not only the majority's legal errors, but also its factual findings that Plaintiffs and Defendants disfavor.[2]

Finally, in all events, even if Plaintiffs and Defendants had properly framed the issue presented, their conclusion that the Court should deny a stay is fundamentally wrong. That the Court granted plenary review means that there is *some* prospect of reversal—and any such prospect warrants a stay due to the extraordinary injury that the Commonwealth, its voters, and its candidates undisputedly will suffer if that risk eventuates. The Court should grant a stay.

II. THE MAJORITY LACKED JURISDICTION TO ENTER THE REMEDIAL PLAN

Even if the Court does not believe that the requirements for a stay are satisfied by the undisputed risk of electoral chaos shown above, it still should grant a stay because the majority lacked jurisdiction to enter the remedial plan. *See* App'n 37-39; *Donovan v. Richland County Ass'n*, 454 U.S. 389, 390 n.2 (1982); *United States v. Locke*, 471 U.S. 84, 92 (1985); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); *East Carroll Parrish School Bd. v. Marshall*, 424 U.S. 636, 638 n.4 (1976). Plaintiffs and Defendants repeat the majority's unpersuasive reasoning that the notice of appeal divested the lower court of jurisdiction only over liability, but not over the remedy. Pl. Opp. 32-36; Def. Opp. 37-39. Thus, like the

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[2] Plaintiffs' challenge to Applicants' standing is so unmeritorious that even Defendants do not join it. *See* Pl. Opp. 25; Def. Opp. 27-32. Applicant Forbes has standing because the remedial plan directly injures his re-election prospects, and all Applicants in districts adjacent to District 3 have standing because the liability judgment necessarily requires altering their districts. *See* Br. For Appellants 57-63.

majority, Plaintiffs and Defendants ignore that Applicants' notice of appeal pertained to *both* the majority's liability decision *and* its remedy enjoining use of the Enacted Plan. *See* App'n 37-39. Therefore, even under Plaintiffs' and Defendants' theory, the notice of appeal divested the majority of jurisdiction over the entire case, including the remedy. *See id.*

Indeed, Plaintiffs' and Defendants' cases involving appeals to federal courts of appeals vividly illustrate that the majority lacked jurisdiction to enter the remedial plan. Plaintiffs' and Defendants' cases hold that while a district court may "enforce" an injunction on appeal such as through contempt or ongoing supervision, it may not "enlarge the scope" of the injunction or grant additional remedies, even if the additional remedies were contemplated by, or relate to, the original injunction. *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (collecting cases) (cited at Pl. Opp. 33 and Def. Opp. 37); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 827 (10th Cir. 1993) (cited at Pl. Opp. 34). Thus, while the three-judge court could *enforce* its original injunction prohibiting Virginia from using the Enacted Plan, it lacked jurisdiction to *enlarge* that injunction to require use of a specific judicial remedial plan while the direct appeal of the injunction remained pending. *See, e.g., Cincinnati Bronze, Inc.*, 829 F.2d at 588; *Roberts*, 998 F.2d at 827.

Moreover, Plaintiffs and Defendants suggest that Rule 62(c) confers jurisdiction to enter a remedial plan, Pl. Opp. 34; Def. Opp. 37, but precisely the *opposite* is true. Rule 62(c) authorizes district courts to enter an "injunction pending appeal" only "on terms for bond or other terms that secure the opposing

party's rights" pending the appeal. Fed. R. Civ. P. 62(c). It therefore did not give the majority carte blanche to enter a remedial plan while "the entire case" is pending before this Court. *Locke*, 471 U.S. at 92; *Wells Fargo Bank*, 485 U.S. at 354.

Finally, any doubt on jurisdiction must be resolved in favor of Applicants and against Plaintiffs who sought entry of a remedial plan while the Court's plenary review of liability remained pending. *See* App'n 37-39; *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).[3]

CONCLUSION

The Court should stay the lower court's remedial plan and allow the 2016 elections to proceed under the Legislature's Enacted Plan.

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[3] Plaintiffs and Defendants repeat their reliance on *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004) (Pl. Opp. 35 & Def. Opp. 34), even though that case has no bearing here because no party challenged the three-judge court's jurisdiction to enter a remedial plan, the three-judge court did not consider that question, and this Court *summarily affirmed* the liability judgment without conducting plenary review, *see, e.g.*, 542 U.S. 947; App'n 39 n.4.

Respectfully submitted,

January 22, 2016

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29, I, John M. Gore, a member of the Supreme Court Bar, hereby certify that one copy of the attached Reply was served via electronic mail and UPS on January 22, 2016 on:

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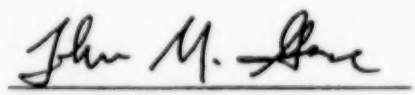

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No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

APPELLANTS' BRIEF REGARDING STANDING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

APPELLANTS' BRIEF REGARDING STANDING ... 1

BACKGROUND 2

A. District 3 And Surrounding Districts 2

B. Plaintiffs' Lawsuit 4

C. Proposed Remedies 5

ARGUMENT 7

I. APPELLANTS HAVE STANDING TO APPEAL BECAUSE THE JUDGMENT DIRECTLY INJURES THEM 7

CONCLUSION 15

APPENDIX A: Intervenor-Defendants' Brief Regarding Proposed Remedial Plans Submitted by Plaintiffs and Non-Parties, *Personhuballah, et al. v. Alcorn, et al.*, No. 3:13-cv-678, (E.D. Va. October 7, 2015) 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Ala. Leg. Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 5

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) ..... *passim*

Clinton v. City of New York,
524 U.S. 417 (1998) 1, 11, 13

Davis v. FEC,
554 U.S. 724 (2008) 12

Diamond v. Charles,
476 U.S. 54 (1986) 1

FEC v. Akins,
524 U.S. 11 (1998) 12, 13

Firefighters Local 93 v. City of Cleveland,
478 U.S. 501 (1986) 14

Firefighters Local 1784 v. Stotts,
467 U.S. 561 (1984) 14

Hall v. Virginia,
276 F. Supp. 2d 528 (E.D. Va. 2003) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 1, 14

Johnson v. Mortham,
915 F. Supp. 1529 (N.D. Fla. 1995) 15

King v. Illinois State Bd. of Elections,
410 F.3d 404 (7th Cir. 2005) 10, 14

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 7

Martin v. Wilks,
490 U.S. 755 (1989) 14

Meese v. Keene,
481 U.S. 465 (1987) 2, 10, 12, 13

Moon v. Meadows,
952 F. Supp. 1141 (E.D. Va. 1997),
summ. aff'd, 521 U.S. 1113 (1997) 2

Rumsfeld v. FAIR,
547 U.S. 47 (2006) 1

Swann v. Adams,
385 U.S. 440 (1967) 1, 2, 11, 12

United States v. Hays,
515 U.S. 737 (1995) 13, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Wright v. Rockefeller,
376 U.S. 52 (1964) 14

OTHER AUTHORITIES

"In Surprise Move, Senate Democrats
Adjourn Special Session," Richmond
Times-Dispatch (Aug. 17, 2015) 5

APPELLANTS' BRIEF REGARDING STANDING

A party has Article III standing to appeal when it has "a direct stake in the outcome of a litigation." *Diamond v. Charles*, 476 U.S. 54, 66 (1986); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). Such a direct stake arises when the judgment appealed causes the party "direct injury" that would be redressed by appellate reversal. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618, 624 (1989); *see also Swann v. Adams*, 385 U.S. 440 (1967). Such an injury may be "small," *Diamond*, 476 U.S. at 66-67, or even "contingent" on future events, *Clinton v. City of New York*, 524 U.S. 417, 430 (1998). The "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2 (2006).

Appellants have "a direct stake in the outcome," *Diamond*, 476 U.S. at 66, because the judgment below inflicts "direct injury" on at least one of them, *ASARCO*, 490 U.S. at 618. In particular, the majority's holding that Enacted District 3's 56.3% black voting age population (BVAP) violates *Shaw v. Reno* necessarily requires a remedy that reduces that percentage by swapping black (and overwhelmingly Democratic) voters from District 3 with white (far less Democratic) voters from one or more of the four surrounding districts, *all* of which are represented by a Republican Appellant. Indeed, the Alternative Plan that Plaintiffs introduced at trial and *every* remedial plan proposed post-judgment turns at least one Republican district adjacent to District 3 into a majority-Democratic district—and virtually all redraw *multiple* districts currently represented by

Republican Appellants. The majority's decision thus directly harms at least one Appellant's "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474 (1987), and interests as a Republican voter and candidate, *see Swann*, 385 U.S. at 443.

It should also be noted that, because the Democratic Attorney General of Virginia has abandoned the defense of the Legislature's Enacted Plan, dismissing the appeal not only would allow a judgment that directly injures Appellants to stand, but also permit state officials to impose their partisan political preferences on litigants, the Legislature, and the public at large without appellate review. Appellants have standing, and the Court should note probable jurisdiction or summarily reverse.

BACKGROUND

A. District 3 And Surrounding Districts

District 3 has existed as Virginia's only majority-black congressional district since 1991. *See Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997), *summ. aff'd*, 521 U.S. 1113 (1997); Pl. Ex. 27 at 14. In 2010, District 3 was surrounded by four districts which each elected Republicans: Appellant Robert Wittman won reelection in District 1; Appellant Scott Rigell beat a Democratic incumbent in District 2, a closely divided district politically; Appellant Randy Forbes won reelection in District 4; and Appellant Eric Cantor won reelection in District 7.

The 2010 Census revealed population shifts that required a new congressional districting plan. After Republicans gained control of the Legislature in the 2011 elections, Delegate Bill Janis sponsored the bill that became the Enacted Plan. Janis candidly stated

that his overriding objective was "to respect to the greatest degree possible the will of the electorate as it was expressed in the November 2010 election," when voters elected 8 Republicans—including 4 Republicans in the districts surrounding District 3—and 3 Democrats. J.S. App. 53a.

To accomplish this objective, Janis not only sought, but directly adhered to, "the input of the existing congressional delegation, both Republican and Democrat," Int.-Def. Ex. 9 at 14, in how their districts should be drawn. Janis repeatedly noted that "the district boundary lines were drawn in part on specific and detailed recommendations" from "each of the eleven members currently elected to [C]ongress." *Id.* 8. After the Enacted Plan was drawn, Janis "spoke[] with each" incumbent and "showed them a map of the lines." *Id.* "[E]ach member of the congressional delegation both Republican and Democrat has told me that the lines" conform to "the recommendations that they provided me, and they support the lines for how their district is drawn." *Id.* 9-10; J.S. App. 56a.

Plaintiffs' sole witness at trial, Dr. Michael McDonald, conceded that the Enacted Plan's changes to District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts. Tr. 122, 128. The undisputed electoral data also confirmed that the Enacted Plan's changes to District 3 were "politically beneficial" to the Republican incumbents in adjacent districts because they moved Democrats out of, and Republicans into, those districts. *Id.* 122-28. For example, prior to the Enacted Plan, District 2 was a closely divided district where Barak Obama and John McCain each captured 49.5% of the vote in 2008.

Int.-Def. Ex. 20. The Enacted Plan increased District 2's Republican vote share by 0.3%. *Id.* The same pattern adhered in the other districts surrounding District 3: District 1 became 1% more Republican; District 4 became 1.5% more Republican; and District 7 became 2.4% more Republican. *Id.* All eight districts represented by an Appellant are plurality- or majority-Republican under the Enacted Plan. *See id.*

The 2012 and 2014 elections proceeded under the Enacted Plan. In both elections, all four districts surrounding District 3 elected Republicans. In 2014, District 1 reelected Appellant Wittman; District 2 reelected Appellant Rigell; District 4 reelected Appellant Forbes; and District 7 elected Appellant David Brat. All eight Appellants currently serving in Congress intend to seek reelection in 2016.

B. Plaintiffs' Lawsuit

Plaintiffs initiated a *Shaw* challenge to District 3 in October 2013. *See* Compl. (DE 1). The eight Appellants then serving as members of Congress moved to intervene as intervenor-defendants. *See* J.S. App. 3a-4a. Plaintiffs did not oppose that motion, and the three-judge court granted it. *See id.*

Plaintiffs sought to prove their *Shaw* claim in part through an Alternative Plan that replicates most of the Enacted Plan, but shifts the boundary between Districts 2 and 3. Tr. 157. The Alternative Plan reduces District 3's BVAP by 6%, to 50.2%. *Id.* 172. At the same time, it increases District 2's Democratic vote share by 5.4%. Int.-Def. Ex. 22. The Alternative Plan thus turns District 2 from an evenly divided "49.5% Democratic district" into a 54.9% Democratic district that even Dr. McDonald described as "heavily

Democratic." Tr. 153; Int.-Def. Ex. 22; J.S. App. 88a.

Following trial, the three-judge court issued a 2-1 split decision holding that Enacted District 3 violates *Shaw*. Mem. Op. (DE 109). The eight original Appellants appealed to this Court, which vacated and remanded for further consideration in light of *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). *See Cantor v. Personhuballah*, No. 14-518.

On remand, the three-judge court granted intervention to Appellants David Brat and Barbara Comstock, who had been elected to Congress during the appeal. The majority thereafter issued a substantially similar opinion invalidating Enacted District 3 and enjoining any congressional elections in Virginia until a remedial plan is adopted. *See* J.S. App. 1a. All ten Appellants appealed to this Court. Defendants did not join the appeal.

C. Proposed Remedies

The three-judge court accorded the Legislature until September 1, 2015, to adopt a remedy. Governor McAuliffe called the Legislature into a special session to convene on August 17, 2015. That special session lasted a matter of hours before the Senate Democrats, joined by a single Republican, adjourned sine die. *See* "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch (Aug. 17, 2015).

The three-judge court has opted to proceed toward a judicial remedy during the pendency of Appellants' appeal. The court directed parties and interested non-parties to submit proposed remedial plans by September 18, 2015. *See* Order (DE 207). The court has appointed Dr. Bernard Grofman as a special

master and directed him to submit a remedy to the court by October 30, 2015. *See* Order (DE 241).

All properly filed proposed remedial plans make at least one Republican district represented by an Appellant majority-Democratic. Appellants proposed two remedial plans, both of which increase District 2's Democratic vote share from 49.3% to 50.2%. *See* Int.-Def. Exs. I, S (DE 232-9, DE 232-19).

The other proposed remedial plans seek to undo the Legislature's 8-3 pro-Republican partisan split, and turn at least one Appellant's Republican district into a majority-Democratic district:

- Plaintiffs have abandoned the Alternative Plan in favor of a proposed remedial plan that creates a 6-5 partisan split by making District 2, currently represented by Appellant Rigell, 54.8% Democratic and District 4, currently represented by Appellant Forbes, 52.2% Democratic. App. 12a.
- Governor McAuliffe's proposed remedial plan redraws every congressional district in Virginia and turns Districts 4, 5, and 10—currently represented by Appellants Forbes, Hurt, and Comstock—into majority-Democratic districts with 66.7%, 52.3%, and 54.8% Democratic vote shares. App. 17a.
- The NAACP plan turns District 4 into a 68.2% super-majority Democratic district. App. 25a.
- The Petersen plan turns Districts 1, 2, and 10 into majority-Democratic districts. App. 27a. It also pairs Appellants Goodlatte, Hurt, and Griffith in District 6 and pairs Appellant Comstock and Congressman Gerry Connolly in

District 11. App. 28a.

- The Richmond First Club plan turns District 7 (which it renumbers District 5) and District 8 (which it renumbers District 1) into majority-Democratic districts. App. 29a. It also pairs Appellant Comstock and Congressman Don Beyer in District 1; Appellants Forbes and Rigell in District 4; Appellants Brat and Hurt in District 7; and Appellants Goodlatte and Griffith in District 8. App. 29a-30a.
- The Rapoport plan turns District 4 into a majority-Democratic district. App. 31a. It also pairs Appellants Rigell and Forbes in District 2. *Id.*[1]

ARGUMENT

I. APPELLANTS HAVE STANDING TO APPEAL BECAUSE THE JUDGMENT DIRECTLY INJURES THEM

This Court's precedent plainly establishes that an intervenor-defendant has standing to appeal a "judgment" that causes it "direct, specific, and concrete injury," where "the requisites of a case or controversy are also met." *ASARCO*, 490 U.S. at 623-24; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("irreducible constitutional minimum" of standing requires "injury in fact" and "causal

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[1] Bull Elephant Media and Donald Garrett also submitted proposed remedial plans, but those submissions do not comply with the three-judge court's order. In any event, by their proponents' own admission, those plans change at least one district represented by an Appellant. *See* DE 222, 238.

connection" likely to be "redressed by a favorable decision"). Appellants are directly injured by the judgment below and, thus, have standing to appeal it.

1. *ASARCO* began as a state-court suit brought by taxpayers claiming that mineral leases issued by the State of Arizona violated federal law. *See* 490 U.S. at 610. Some of the lessees intervened as defendants. *Id.* After the Arizona Supreme Court upheld the plaintiffs' claims, the intervenor-defendants sought review in this Court. *Id.* The State defendants did not join the petition for this Court's review. *Id.*

This Court held that the intervenor-defendants had standing to invoke the Court's jurisdiction even in the absence of the State defendants, and even though the state-court order did not require them to do or to refrain from doing anything. *See id.* at 617-624. The Court explained that the state-court decision "poses a serious and immediate threat to the continuing validity of th[e] leases." *Id.* Thus, the decision was "an adjudication of legal rights" "adverse" to the intervenor-defendants that caused an "actual or threatened injury that is sufficiently distinct and palpable to support their standing." *Id.* The Court further recognized that this injury-in-fact was redressable on appeal because "our reversal of the decision below would remove its disabling effects upon" the intervenor-defendants. *Id.* at 618-19.

ASARCO straightforwardly demonstrates that Appellants have standing to appeal because the majority's decision invalidating Enacted District 3 is an "adverse" "adjudication of legal rights" that imposes an injury-in-fact on at least one Appellant. *Id.* at 618. In fact, Appellants' injury-in-fact caused

by the majority's decision is even *more* "direct, specific, and concrete" than the injury this Court deemed sufficient to confer standing in *ASARCO*. *Id.* at 623-24. Here, there is not merely a "serious and immediate *threat* to the continuing validity of," but in fact an "actual" *invalidation* of, Enacted District 3. *Id.* at 618 (emphasis added).[2]

Moreover, the order necessarily requires a remedy that will harm at least one Appellant. The majority concluded that the Legislature retained too many black (overwhelmingly Democratic) voters in District 3. J.S. App. 1a-3a. Any remedy must therefore move such voters *out* of District 3 and into one or more of the surrounding Republican districts, and an equal number of non-black (and largely Republican) voters into District 3. *All* of these adjacent districts are represented by Appellants. Thus, any remedy for the *Shaw* violation found below will necessarily alter at least one Republican district where an Appellant has previously voted and been elected.

This remedial outcome is no mere "threat," but a *certainty*. *ASARCO*, 490 U.S. at 618. Because Appellants' districts surround District 3, any District 3 remedy necessarily alters the composition of districts that both previously elected an Appellant and expressly "conformed" to incumbent Appellants' detailed "recommendations" on how their districts should be drawn. *See supra* pp. 2-4. Moreover, both

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[2] As in *ASARCO*, this case otherwise presents "a cognizable case or controversy" because Appellants and Plaintiffs "remain adverse," and "valuable legal rights will be directly affected" by the Court's resolution of the appeal. 490 U.S. at 619.

the Alternative Plan and *all* proposed remedies transform at least one Republican Appellant's district into a majority-Democratic district. *See supra* pp. 6-7. For example, Plaintiffs' Alternative Plan, which will at least be a starting point for any remedy, harms Appellant Rigell by turning toss-up District 2 into a "heavily Democratic" district. Tr. 119, 152-53; J.S. 3. Plaintiffs' remedial plan is even more injurious to Appellants because it not only turns District 2 into a heavily Democratic district, but also turns Appellant Forbes's District 4 into a majority-Democratic district. *See supra* p. 6. Other proposed remedial plans are equally bad or worse, redrawing at least one Appellant's district—and often several Appellants' districts—into majority-Democratic districts and, in some instances, pairing two or more Appellants in the same district. *See supra* pp. 6-7.

Such changes will obviously injure every affected Appellant because they will undo his or her recommendations for the district, replace a portion of the "base electorate" with unfavorable Democratic voters, and harm the Appellant as a Republican candidate and voter. *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 409 n.3 (7th Cir. 2005); *see Keene*, 481 U.S. at 474-75 (standing based on harm to "chances for reelection"). These injuries would clearly be redressed through a successful appeal because "reversal of the decision below would remove its disabling effects upon" Appellants and restore the Enacted Plan under which they were elected and which maximizes their chances for reelection. *ASARCO*, 490 U.S. at 618-19. Appellants therefore have shown a "direct, specific, and concrete injury" sufficient to "support their standing" to invoke "this

Court['s] review" of the judgment. *Id.* at 618, 624.

Indeed, the judgment challenged here will affect Appellants far more tangibly and directly than lower-court judgments that this Court routinely finds confer standing; *i.e.*, "the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial." *Clinton*, 524 U.S. at 430. A judgment setting aside a pro-defense verdict can only "contingent[ly]" affect the defendant—he will be harmed only if he loses on remand. *Id.* In other words, the judgment affects the defendant's interests only because it converts a *certain* victory into a *potential* victory. Here, Appellants' harm is not contingent on the outcome of future proceedings or anything else; their interests are directly and immediately affected by the adverse judgment below because it necessitates prompt alteration of their existing districts.

2. Appellants' injury is more "direct, specific, and concrete" not only than the injury in *ASARCO*, 490 U.S. at 623-24, but also than injuries this Court has repeatedly upheld as sufficient to confer standing in the electoral context. For example, this Court held that a group of voters had standing both to bring an equal-population challenge to a Florida redistricting plan and to appeal an adverse judgment to this Court even though they resided in Dade County, which they "*concede[d]* has received constitutional treatment under the legislative plan." *Swann*, 385 U.S. at 443 (emphasis added). The Court concluded that these voters had standing because the district court rejected their proposed remedial plan "which would have accorded different treatment to Dade County in some respects as compared with the legislative plan,"

and had also "seemingly treat[ed] [them] as representing other citizens in the State." *Id.*

If these voters had standing to sue and to appeal even though the challenged plan did not directly affect their county, Appellants plainly have standing to appeal the majority's judgment that indisputably affects their districts. Any remedy will *necessarily* provide "different treatment" to their districts than that provided by the Enacted Plan. *Id.*

Moreover, this Court held that standing arose where a political candidate averred that "exhibition of films that have been classified as 'political propaganda' by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community." *Keene*, 481 U.S. at 474. Similarly, *FEC v. Akins*, 524 U.S. 11, 21 (1998), held that voters had standing to challenge the FEC's decision that a group was not a "political committee," which exempted the group from certain disclosure requirements and thereby deprived the voters of information regarding the group's donors, contributions, and expenditures. And *Davis v. FEC*, 554 U.S. 724 (2008), held that a candidate had standing to challenge a campaign finance law that had a far less direct effect on his electoral opportunities than that suffered by Appellants here. Specifically, the "self-financing" plaintiff candidate had standing to challenge a federal law because it "burdened his expenditure of personal funds by allowing his opponent to receive contributions on more favorable terms" and "most candidates who had the opportunity to receive expanded contributions had done so." *Id.* at 734-735. If the "burden" of enabling one's opponent to solicit

funds under more generous contribution limits is sufficient injury, *a fortiori* the burden of running in a different district with an electorate that has a cognizably greater presence of the opposing party's voters is quite sufficient.

As this reflects, the harm to Appellants from the majority's decision is far more "substantial" than the harms identified in these cases. *Keene*, 481 U.S. at 474. As noted, the electoral injury is far more concrete than the effect of an opponent's potentially enhanced war chest or voters' potential knowledge of and distaste for a candidate's involvement in a film the Government labels "propaganda." It is also far more tangible than the informational or "contingent" injuries in *Akins* and *Clinton*. Rather, by necessarily requiring changes to the political composition of at least one Appellant's district, the judgment below harms one or more Appellants' "chances for reelection," *Keene*, 481 U.S. at 474, and voting strength as Republican voters.

Finally, Appellants' injury is just as direct and concrete as the injury that conferred standing on the plaintiffs in *United States v. Hays*, 515 U.S. 737 (1995). Just as those plaintiffs' constitutional interests were injured by residing in a district that they alleged was different than that required by a proper interpretation of *Shaw*, so too are Appellants injured because, after any remedy, some will reside in districts they allege are different than those required by a proper interpretation of *Shaw*; *i.e.*, the Enacted Plan's *Shaw*-compliant districts. Just as a plaintiff is injured by a redistricting plan if he resides in the district affected by the alleged unconstitutionality, Appellants are injured by the

majority's command to alter District 3 because their districts will necessarily be affected by that order.

3. The district court granted Appellants intervention in accordance with myriad prior cases. *Wright v. Rockefeller*, 376 U.S. 52 (1964); *King*, 410 F.3d 404; *Hall v. Virginia*, 276 F. Supp. 2d 528 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004). Plaintiffs did not oppose intervention when Appellants' interests faced only potential injury but now oppose standing when Appellants face *certain* harm from the adverse judgment. Pl. Mot. 6-8.

Plaintiffs' had it right the first time. Plaintiffs argue that an intervenor-defendant has standing to appeal only where the order directs it "to do or to refrain from doing" some action. *Id.* 7 (citing *Hollingsworth*, 133 S. Ct. at 2662). But an intervenor-defendant obviously also has standing to appeal an order that "directly affect[s]" its interests in ways other than compelling or restricting its action. *ASARCO*, 490 U.S. at 619. For example, when the order potentially invalidates lease rights, *id.* at 618-19, or diminishes promotion or other employment opportunities, *see Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Firefighters Local 93 v. City of Cleveland*, 478 U.S. 501 (1986); *Martin v. Wilks*, 490 U.S. 755 (1989), it directly harms appellants even though it does not command them to take or refrain from some action. *Hollingsworth* in no way alters this basic rule, but instead reaffirms that an appellant must merely "possess a direct stake in the outcome of the case." 133 S. Ct. at 2662.

Moreover, as discussed, *Hays* directly supports Appellants' standing. *See supra* pp. 13-14. Plaintiffs'

lone lower-court authority, *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995) (Pl. Mot. 8), involves intervention and *supports* Appellants' standing.[3]

Finally, Plaintiffs' contention that Appellants' harm is "speculative" because the Republican-controlled Legislature *could* adopt "a remedy . . . to Appellants' political advantage," Pl. Mot. 8, is entirely backwards. *Plaintiffs'* rank speculation about how future events might moot a case cannot defeat Appellants' present standing. Otherwise, there would never be standing because the challenged law or practice could always *potentially* be repealed or changed to the appellant's advantage. That is particularly true here because the speculated legislative action is extraordinarily unlikely to occur—the Senate Democrats ended the Legislature's special session to consider legislative remedies almost as quickly as it began. Anyway, any remedial plan approved by the Legislature (and *Democratic* governor) would still have to cure the *Shaw* violation the majority found in District 3. Thus, like *all* remedies, any legislative remedy would invariably alter one or more of Appellants' districts and harm every affected Appellant as a candidate and voter.

CONCLUSION

Appellants have standing, and the Court should summarily reverse or note probable jurisdiction.

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[3] *Johnson* granted intervention to a congresswoman in a district challenged under *Shaw* based on her "personal interest in her office" and in "keeping District Three intact." 915 F. Supp. at 1538. Appellants have an identical "interest" in "keeping District Three" and (consequently) their own districts "intact."

Respectfully submitted,

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October 13, 2015

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

GLORIA PERSONHUBALLAH, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 3:13-cv-678**
JAMES B. ALCORN, et al.,	)	
Defendants.	)	

INTERVENOR-DEFENDANTS' BRIEF REGARDING PROPOSED REMEDIAL PLANS SUBMITTED BY PLAINTIFFS AND NON-PARTIES

* * *

All of the proposed remedial plans submitted by Plaintiffs and non-parties dramatically underscore that the Court should enter Intervenor-Defendants' Proposed Remedial Plan 1 or Proposed Remedial Plan 2 if a judicial remedy becomes necessary in this case. Intervenor-Defendants' proposed plans are the *only* plans in the record that ensure that this Court, in entering a remedy, would narrowly cure the violation it found and "not pre-empt the legislative task nor intrude on state policy any more than necessary." *White v. Weiser*, 412 U.S. 783, 795 (1973); *Upham v. Seamon*, 456 U.S. 37, 41 (1982); *see also* Int.-Def. Br. 1-15 (DE 232).

At trial, Plaintiffs sought to prove their *Shaw* claim at least in part through their Alternative Plan—and this Court treated the Alternative Plan as the constitutional minimum for District 3. *See* Int.-Def. Br. 2, 7. In particular, the Court reasoned that Alternative District 3 is constitutional because it reduces District 3's black voting-age population ("BVAP") from 56.3% to 50.1%, "maintains a majority-minority district," "results in . . . one less locality split" than the Enacted Plan, and improves District 3's compactness. 6/5/15 Mem. Op. 28-32 (DE 170) ("Op."). Indeed, the Court must have viewed the Alternative Plan as a constitutional benchmark because it would have made no sense to prove or remedy a *Shaw* violation in District 3 with an alternative plan that *violates Shaw*. Moreover, Plaintiffs were required, as part of their prima facie burden, to present a plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred "traditional districting principles" while

bringing about "significantly greater racial balance" than the Enacted Plan, *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)—and the Alternative Plan was the only plan Plaintiffs presented at trial.

Both of Intervenor-Defendants' proposed remedial plans are clearly superior to the Alternative Plan as a judicial remedy. *See* Int.-Def. Br. 1-15. On the one hand, Intervenor-Defendants' plans cure the defects the Court found in Enacted District 3 to the same extent as the Alternative Plan, since they mirror Alternative District 3's BVAP level and perform as well or better than the Alternative Plan on locality splits and compactness. They are a manifestly superior remedy, however, because, unlike the Alternative Plan, they go no further than what is "necessary to cure" the violation and, relatedly, better comply with "'the legislative policies underlying'" the Enacted Plan. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95; *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). Specifically, they are far better than the Alternative Plan regarding the Legislature's priorities that this Court held "inarguably" "played a role in drawing" Enacted District 3: maintaining the 8 Republican to 3 Democrat ratio established in 2010, preserving district cores, and protecting all incumbents. Op. 35; Int-Def. Br. 10-15.

By contrast, the proposed remedial plans offered by Plaintiffs and the non-parties all violate these basic limits on judicial remedial power even more than the Alternative Plan does. Plaintiffs have explicitly abandoned the Alternative Plan and "do not propose" that the Court adopt it "as a remedy." Pl. Br. 4 (DE 229). Yet Plaintiffs' new proposed remedial plan

makes even more sweeping changes that are neither "necessary to cure" the violation in District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, nor compliant with "the legislative policies underlying" the Enacted Plan, *Perez*, 132 S. Ct. at 941. Moreover, even though Plaintiffs' remedial plan makes numerous changes that go well beyond curing the identified violation, it does not achieve the basic requirement of curing the violation, because it does not match Alternative District 3's 50.1% BVAP, but instead reduces District 3's BVAP to only 51.5%. The plan therefore does not even satisfy the constitutional benchmark the Court has set in this case. *See* Op. 28-32.

The fatal flaws in Plaintiffs' new plan do not end there. Most obviously, Plaintiffs' remedial plan makes changes to Districts 5, 6, and 9—which do not even border District 3—so those changes are clearly not "necessary to cure" any violation in District 3. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95. Moreover, Plaintiffs' plan seeks to override the Legislature's "inarguabl[e]" political and incumbency-protection goal of maintaining the 8-3 pro-Republican split, Op. 35: while the Alternative Plan is a Democratic partisan gerrymander that turned one Republican district into a majority-Democratic district, Plaintiffs' new plan is even worse because it turns *two* districts currently represented by Republicans, Districts 2 and 4, into majority-Democratic districts. Unsurprisingly, Plaintiffs' plan also performs far worse on core preservation—including in District 3—than the Enacted Plan or even the Alternative Plan. Plaintiffs' plan therefore performs worse than the Enacted Plan and even the

Alternative Plan on *all* of the paramount "legislative policies underlying" the Enacted Plan. *Perez*, 132 S. Ct. at 941.

All non-party proposed remedial plans likewise fail the governing rules and thus cannot be entered as a judicial remedy. Those plans either sweep far beyond the scope of any violation in District 3 by seeking to redraw the entire State, or depart from the Legislature's political, incumbency-protection, and core-preservation goals that drove the Enacted Plan.

The Court therefore faces the same choice faced by the court in *White v. Weiser*: Intervenor-Defendants' proposed plans cure the violation found by the Court and "adhere[] to the" political and incumbency-protection "desires of the state legislature" to "a greater extent than" all other proposed remedial plans. 412 U.S. at 795. Because redistricting inevitably "has a sharp political impact and inevitably political decisions should be made by those charged with the task," the Court is required to implement one of Intervenor-Defendants' proposed plans, "which most closely approximate[s] the reapportionment plan of the state legislature," and to avoid the competing remedial plans with their markedly different "political impact." *Id.* at 795-96; *see also* Int.-Def. Br. 3-15. The Court should reject all other plans and adopt Intervenor-Defendants' Proposed Remedial Plan 1 or Proposed Remedial Plan 2 if a judicial remedy becomes necessary in this case.

ARGUMENT

I. THE PROPOSED REMEDIAL PLANS SUBMITTED BY PLAINTIFFS AND NON-

PARTIES ARE OVERBROAD AND CONTRAVENE THE LEGISLATURE'S REDISTRICTING PRIORITIES

Because "[r]edistricting is 'primarily the duty and responsibility of the State,'" *Perez*, 132 S. Ct. at 940 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)), and "primarily a matter for legislative consideration and determination," *White*, 412 U.S. at 794-95 (1973), judicial redistricting by federal courts is an "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), that threatens "a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Accordingly, remedial redistricting by federal courts is strictly confined by two rules ensuring that the federal judiciary does "not pre-empt the legislative task nor intrude on state policy any more than necessary." *White*, 412 U.S. at 795; *Upham*, 456 U.S. at 41. *First*, any judicial redistricting plan must be no broader than "necessary to cure" the constitutional defect in the legislature's duly enacted plan. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95. *Second*, when "'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Perez*, 132 S. Ct. at 941 (quoting *Abrams*, 521 U.S. at 79).

Plaintiffs and Governor McAuliffe attempt to avoid this bedrock requirement of federal judicial deference to state legislative prerogatives, *see* Pl. Br. 5-6; Gov. Br. 6-13 (DE 231), but their attempt to change the law is wholly without merit. Plaintiffs and the

Governor contend that the Supreme Court's decision in *Abrams v. Johnson*, 521 U.S. 74 (1997), categorically bars *any* deference by a federal court to any aspect of a redistricting plan found to contain a *Shaw* violation and, thus, that this Court may not defer to the Legislature's race-neutral redistricting priorities in drawing the Enacted Plan. *See* Pl. Br. 5-6; Gov. Br. 8-9. But *Abrams* plainly does not fashion any such rule—to the contrary, it confirms that this Court "should be guided by the legislative policies underlying" the Enacted Plan "to the extent those policies d[id] not lead to" the "violation[] of the Constitution" in District 3. *Abrams*, 521 U.S. at 79.

As the Governor's own quotation to *Abrams* confirms, *Upham* deference "is not owed" to a legislative plan only *"to the extent* the plan subordinated traditional districting principles to racial considerations." *Id.* at 85 (emphasis added) (quoted at Gov. Br. 8-9). As the Supreme Court explained, the Georgia congressional plan challenged in *Abrams* subordinated traditional districting principles to race *statewide*. *See id.* at 85-86. The Georgia Legislature drew that plan to comply with the Justice Department's "max-black policy," which required creation of the maximum number of majority-black districts as a precondition to preclearance. *Id.* at 84. The Georgia Legislature thus drew 3 of Georgia's 11 congressional districts as majority-black districts in different parts of the state. *See id.* at 77-78. The Supreme Court upheld the district court's determination that 2 of those districts violated *Shaw*. *See id.*

Turning to the remedy, the Supreme Court held that any judicial remedy could not implement the

flawed max-black policy that had led to the *Shaw* violations in the first place. *See id.* at 85-86. The Supreme Court further noted that the 2 districts held to violate *Shaw* "affect[ed] a large geographic area of the State." *Id.* at 86. In particular, those districts were located "on opposite sides of the State," contained "between them all or parts of nearly a third of Georgia's counties," split "[a]lmost every major population center . . . along racial lines," and bordered the majority of other districts. *Id.* Given the pervasiveness of the *Shaw* violations across the entire State, the Supreme Court acknowledged that "any remedy of necessity must affect almost every district." *Id.* The Supreme Court hastened to add, however, the any remedy should remain "consistent with Georgia's traditional districting principles." *Id.*

There is no such "necessity" of a statewide *remedy* here because there is no statewide *violation*. *Id.* The Legislature did not follow a max-black policy or draw a second district "on the opposite side[] of the State" that violated *Shaw*. *Id.* Instead, the Court held that the Enacted Plan commits a localized *Shaw* violation in District 3. *See* Op. 1-2. Moreover, District 3 is located in just one area of the Commonwealth, does not contain anywhere near a third of Virginia's counties, and does not border the majority of other districts. In short, this Court held that Enacted District 3 unconstitutionally subordinated districting principles to race only to the extent it departed from the Alternative Plan and those departures can obviously be cured with minor alterations to District 3 (as evidenced by the fact that the Alternative Plan affected only one other district—District 2). Thus,

the remedy here must have a limited *geographic* scope.

As to the *substantive* scope of the remedy, *Abrams* authorizes the Court to depart from the Enacted Plan *only "to the extent* [it] subordinated traditional districting principles to racial considerations"; otherwise, it must adhere to the Legislature's non-racial "districting principles." *Abrams*, 521 U.S. at 85-86 (emphasis added).[1] Thus, any remedial plan must adhere to the Legislature's non-racial policies of preserving district cores and the 8-3 ratio through incumbency protection. These policies are obviously not racial and, unlike *Abrams*, were not *infected* by race; to the contrary, the Court found that these non-racial motives were *overcome* by the "paramount" motive of race (*i.e.*, Section 5 compliance). *See* Op. 34-41.

Under these basic remedial principles, Intervenor-Defendants' Proposed Remedial Plan 1 and Proposed Remedial Plan 2 pass the *Upham*, *Perez*, and *Abrams* tests with flying colors: those plans cure the *Shaw* violation "to the extent" found by the Court because

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[1] Plaintiffs' citation to *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223, at *6 (E.D.N.Y. Mar. 19, 2012), is even more inapposite. *Favors* was an *impasse* case: the New York Legislature had failed to redistrict following the 2010 Census, so *all* of New York's congressional districts were unconstitutional under the Fourteenth Amendment's equal-population requirement. *See id.* at *1. Thus, the three-judge court's holding that it owed no deference to a decade-old redistricting plan that had become infected with constitutional error in every district, *see id.* at *6, has no bearing on whether this Court must defer to the Legislature's Enacted Plan "to the extent [its] policies [did] not lead to [the] violation[] of the Constitution" this Court found in District 3, *Abrams*, 521 U.S. at 79.

they meet or exceed the Alternative Plan's constitutional benchmarks, *Abrams*, 521 U.S. at 85, are narrowly drawn to fix the violation, and perform significantly *better* than the Alternative Plan on the Legislature's animating priorities of maintaining the 8-3 partisan split, protecting all incumbents, and preserving district cores, *see* Int.-Def. Br. 1-15. Thus, the Court may enter either plan if a judicial remedy becomes necessary in this case. *See id.*

All other proposed remedial plans, however, fail these rules because each is broader than "necessary to cure" the constitutional defect found in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, departs from the Legislature's paramount "policies," *Perez*, 132 S. Ct. at 941; *Abrams*, 521 U.S. at 79, or both. The Court therefore should reject all of these plans.

A. Plaintiffs' New Proposed Plan Is An Egregious Partisan Gerrymander That Sweeps Across The Commonwealth And Defies The Legislature's Political, Incumbency-Protection, And Core-Preservation Goals

Plaintiffs have abandoned the Alternative Plan they sponsored at trial in favor of a new and fundamentally flawed proposed remedial plan, *see* Pl. Br. 4-5, that fails all requirements for a judicial remedy and is an even more egregious partisan gerrymander than the Alternative Plan. First, Plaintiffs' new plan does not comport with the constitutional benchmark the Court established: by Plaintiffs' own admission, their new plan reduces District 3's BVAP only to 51.5%, or 1.4% *higher* than the 50.1% BVAP in Alternative District 3. *See id.* 3;

Ham. Dec. Ex. C (DE 230). There is no basis for concluding that a 51.5% BVAP level is less race-conscious or more respectful of traditional districting principles than the 53.1% BVAP in Benchmark District 3 or the 56.3% BVAP in Enacted District 3 condemned by this Court's liability opinion—and Plaintiffs do not even *attempt* to identify such a basis. *See* Pl. Br. 3-5. Thus, Plaintiffs' failure to achieve the constitutional benchmark set by the Court, *see* Op. 32-35, alone invalidates Plaintiffs' new proposed plan as a judicial remedy.

In any event, Plaintiffs' new plan is facially unacceptable because it both sweeps far broader than "necessary to cure" any constitutional defect found by this Court and, in doing so, affirmatively contravenes "the legislative policies underlying" the Enacted Plan, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, *Perez*, 132 S. Ct. at 241. In the first place—unlike Intervenor-Defendants' proposed plans and the Alternative Plan—Plaintiffs' new plan makes changes to districts that do not even border District 3. In particular, Plaintiffs' new plan makes changes to Districts 5, 6, and 9, which are represented by Republicans (and Intervenor-Defendants) Robert Hurt, Bob Goodlatte, and Morgan Griffith respectively. *See* Ham. Dec. Ex. C. These wholly gratuitous changes to non-bordering districts obviously are not limited to curing District 3's identified violation, but advance only Plaintiffs' naked partisan agenda: for example, they increase the Democratic vote share in District 6 by nearly 5% to 46.2%. *See* Pl. Plan Election Data; Int.-Def. Trial Ex. 20.

Moreover, by shifting population across districts, these changes facilitate the changes to District 3 and surrounding districts that unjustifiably depart from "the legislative policies underlying" the Enacted Plan. *Perez*, 132 S. Ct. at 941. Specifically, Plaintiffs' new remedial plan performs far *worse* on the Legislature's paramount traditional priorities of politics, incumbency protection, and core preservation than the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' plans. In the first place, Plaintiffs' remedial plan shifts droves of Democratic voters out of District 3 and transforms the adjacent Republican Districts 2 and 4 into majority-Democratic districts. Plaintiffs' new plan thus not only violates the Legislature's political goals that "inarguably" played a role in drawing the Enacted Plan, but also improperly seeks to replace, by judicial fiat, the 8-3 pro-Republican split that the Legislature sought to maintain with a 6-5 split. *See* Op. 35.

In particular, District 2 represented by Republican Congressman Rigell is an evenly divided "49.5% Democratic" under the Enacted Plan. Tr. 153. Plaintiffs' new remedial plan, however, turns District 2 into a 54.8% Democratic district, Pl. Plan Election Data (Ex. A), which even Plaintiffs' expert, Dr. Michael McDonald, would describe as "heavily Democratic," Tr. 153. Similarly, District 4, represented by Republican Congressman Forbes, is a *48%* Democratic district under the Enacted Plan. *See* Int.-Def. Trial Ex. 20. But Plaintiffs' new plan flips it to a *52.2%* Democratic district—a pro-Democratic swing of 4.2%. *See* Pl. Plan Election Data. Plaintiffs' proposed remedial plan thus decreases District 3's BVAP by 4.8% not to eliminate District 3's racial

identifiability, but to turn two adjacent Republican districts into Democratic districts. *See id.*

For the same reason, Plaintiffs' remedial plan departs from the Legislature's incumbency-protection priority that "inarguably" played a role in drawing Enacted District 3, because it harms Congressmen Rigell and Forbes by making their districts majority-Democratic. Op. 35. Plaintiffs' new plan also harms Republican Congressman Goodlatte by making District 6—which does not even border District 3—46.2% Democratic, or 5% more Democratic than it is under the Enacted Plan. *See* Pl. Plan Election Data; Int.-Def. Trial Ex. 20.

Plaintiffs' remedial plan also performs significantly worse than the Enacted Plan, the Alternative Plan, and Intervenor-Defendants' plans on core preservation—which, it remains undisputed, the Legislature rank-ordered *first* among discretionary state policies. *See, e.g.*, Pl. Trial Ex. 5. The Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts, and 83.1% of District 3's core. *See* Int.-Def. Trial Ex. 27. It therefore treats majority-black District 3 the same on core preservation as the other, majority-white districts across the Commonwealth. *See id.* Intervenor-Defendants' remedial plans likewise preserve between 71.2% and 93.9% of the cores of all districts, and 77.2% and 81.2% of District 3's core, respectively. *See* Int.-Def. Br. 14-15. The Alternative Plan, by contrast, preserves only *69.2%* of District 3's core, the lowest core-preservation percentage of any district in the Alternative or Enacted Plans. *See id.*

Plaintiffs' proposed remedial plan is even worse because it preserves only *64.7%* of District 3's core.

Pl. Plan Core Preservation (Ex. B). Plaintiffs' new plan also preserves even less of the core of District 5, 60.8%. *See id.* The poor performance of Plaintiffs' remedial plan on the core-preservation factor that the Legislature gave top priority further confirms that the Court may not adopt the plan as a judicial remedy here. *See Perez*, 132 S. Ct. at 941.

Plaintiffs' purported explanation for abandoning the Alternative Plan in favor of their new proposed remedial plan—that they sought "to address the objections raised by Defendants to Plaintiffs' prior alternative plan," Pl. Br. 5—cannot withstand even minimal scrutiny. Indeed, the objections to the Alternative Plan that Defendants raised apply *with even greater force* to Plaintiffs' new remedial plan:

- Defendants criticized the Alternative Plan for failing to "achieve the General Assembly's political objectives" because it turns the evenly divided District 2 from a 49.5% Democratic district into a 54.9% Democratic district, Def. & Int.-Def. Joint Trial Brief 17 (DE 85) (cited at Pl. Br. 4), which Dr. McDonald described at trial as "heavily Democratic," Tr. 153. Plaintiffs' remedial plan is even worse because it not only turns District 2 into a heavily Democratic district, but also transforms District 4 from a 48% Democratic district into a 52.2% majority-Democratic district, and increases the Democratic vote share in District 6, which does not border District 3, by 5% to 46.2%. Pl. Plan Election Data.
- Defendants criticized the Alternative Plan because it does not protect all incumbents but instead places Congressman Rigell in a

majority-Democratic district. Def. & Int.-Def. Joint Trial Brief 21-22 (cited at Pl. Br. 4). Plaintiffs' proposed remedial plan is even less protective of incumbents: it not only places Congressman Rigell in a majority-Democratic district, but also places Congressman Forbes in a majority-Democratic district and increases the Democratic vote share in Congressman Goodlatte's District 6 by 5%. Pl. Plan Election Data.

- Defendants criticized the Alternative Plan because it preserves only 69.2% of the core of District 3. Def. & Int.-Def. Joint Trial Brief 21 (cited at Pl. Br. 4). Plaintiffs' remedial plan preserves even less of District 3's core, only 64.7%. Pl. Plan Core Preservation.

Finally, we note that Plaintiffs' remedial plan performs worse on locality splits than Plaintiffs lead the Court to believe. While Plaintiffs' plan reduces the number of locality splits overall, it creates more splits in District 3 than Plaintiffs disclose and introduces new locality splits across the Commonwealth that are absent from the Enacted Plan, the Alternative Plan, and Intervenor-Defendants' plans—including locality splits miles away from District 3's border. Plaintiffs represent that their Remedial District 3 "contains only one split that affects population," Richmond, Pl. Br. 9—but Plaintiffs' own maps and reports in fact confirm that Remedial District 3 *also* splits Henrico in a way that affects population, *see* Ham. Dec. Exs. A, B, C. Plaintiffs' new plan, moreover, splits Nelson County between Districts 5 and 6; Chesapeake, home of District 4's incumbent Republican Congressman

Randy Forbes, between Districts 2 and 4; and Hanover between Districts 1 and 7. *Id.* Ex. C. None of these three localities is split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans. *See* Int.-Def. Trial Ex. 25; Int.-Def. Proposed Plan Ex. E (DE 232-5); Int.-Def. Proposed Plan Ex. O (DE 232-15).

Thus, in sum, Plaintiffs' remedial plan is broader than "necessary to cure" the constitutional defect in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, contravenes "the legislative policies underlying" the Enacted Plan, *Perez*, 132 S. Ct. at 941, and magnifies, rather than address, "the objections raised by Defendants" to the Alternative Plan, Pl. Br. 5. The Court therefore may not adopt Plaintiffs' plan as a judicial remedy.

B. The Governor's Plan Is A Race-Based Plan That Comprehensively Redraws The Entire State To Favor Democratic Political Interests

Governor McAuliffe, a non-party, has asked the Court to enter a remedy that "embrace[s] a comprehensive redrawing of Virginia's congressional districts" and "adopt[s]" the plan proposed by Senator Mamie Locke as SB 5002 during the August 2015 special session. Gov. Br. 13-14.[2]

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[2] The Governor notes that "the Senate of Virginia quickly adjourned" the special session. Gov. Br. 5. In fact, the special session lasted only a matter of hours before the Senate Democrats, joined by a single Republican senator, adjourned sine die. *See* "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch (Aug. 17, 2015), *available at* http://www.richmond.com/news/virginia/government-politics/article_7b98d105-4949-502d-ba7a-

1. At the outset, the Governor's plan does not even *purport* to be aimed at fixing what is "necessary to cure" the identified defects in District 3. Rather, the Governor's plan "comprehensive[ly]" *redraws every district in the Commonwealth.* Gov. Br. 1, 14-15. And it does so for the avowed purpose (among others) of changing the political composition of Virginia's congressional delegation to align with the Governor's pro-Democratic "political preferences," thereby dismantling the 8-3 pro-Republican split that the Republican-controlled Legislature sought to maintain. *See id.* 14-15. Thus, the Governor's plan is far broader than "necessary to cure" the constitutional defect in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, and contravenes "the legislative policies underlying" the Enacted Plan. *Perez*, 132 S. Ct. at 941.

In particular:

- The Governor's plan changes every district in the Commonwealth, including districts as far north as Arlington and as far west as the Virginia-Tennessee state line that are hundreds of miles from District 3's border. *See* Gov. Br. Ex. A.
- The Governor's plan creates a 6-5 pro-Democratic split by turning 3 districts currently represented by Republican incumbents—Districts 4, 5, and 10—into majority-Democratic districts with 66.7%, 52.3%, and 54.8% Democratic vote shares, respectively. *See* Gov. Br. Ex E at 4.
- The Governor's plan therefore fails to protect

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the Republican incumbents in Districts 4, 5, and 10—Congressman Forbes, Congressman Hurt, and Congresswoman Barbara Comstock—while protecting every Democratic incumbent. *See id.*

- Whereas the Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts and 83.1% of District 3's core, *see* Int.-Def. Trial Ex. 27, the Governor's plan preserves between 50.1% and 87.8% of the cores of districts and only 53.2% of District 3's core, Gov. Plan Core Preservation (Ex. C).
- The Governor's plan has 17 locality splits affecting population, more than the 14 in the Enacted Plan, the 13 in the Alternative Plan, and the 13 and 12 in each of Intervenor-Defendants' plans. *See* Gov. Plan Locality Splits (Ex. D).
- While the Enacted Plan's locality splits between Districts 2 and 3 affect 241,096 people, the Governor's plan's splits of Chesterfield, Henrico, and Richmond between District 7 and its new race-conscious and identifiably black District 4 affect *827,385* people—or *3.4 times* as many people as the Enacted Districts 2 and 3 splits. *See id.*
- The Governor's plan splits, in a way that affects population, localities that are not split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans, including Albemarle, Amherst, Arlington, Campbell, Chesapeake, James City, Lynchburg, Manassas, Salem, Suffolk, and

Warren. *See id.*

2. Even more perversely, the Governor's plan seeks to "cure" what the Court found was an excessively race-conscious effort to preserve *one* black opportunity district (in order to satisfy Section 5) by creating *two* black opportunity districts (supported by no Section 5 justification). It reduces District 3's BVAP to 41.9%, more than 8 percentage points lower than Alternative District 3's 50.1% BVAP level. *See* Gov. Br. Ex E at 3. At the same time, it increases District 4's BVAP from 31.3% in the Enacted Plan to 48%. *See id.* The Governor, however, provides no legal justification for this race-conscious effort to create "*two* districts in which African Americans will have an opportunity to elect candidates of their choice." Gov. Br. 15 (emphasis original). Nor could he: Plaintiffs did not plead, much less prove, a Section 2 claim in this case, so there is no basis for this Court to create a second identifiable black district under the guise of remedying the Legislature's alleged racial predominance in District 3. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1 (2009) (discussing requirements for § 2 claims).

3. The Governor presents a panoply of arguments in an attempt to support his proposed "comprehensive redrawing of Virginia's congressional districts," Gov. Br. 13, all of which are facially meritless. *First*, the Governor does not even pretend that his plan is designed to cure the District 3 problems identified in *this* case. Rather, it is an 18-year-late effort to cure the *Shaw* violation found in 1997, on the grounds that the three-judge court in that case somehow failed to correct that violation. Specifically, the Governor argues that District 3's

"infirmity has never been remedied" since this Court found a *Shaw* violation in *Moon v. Meadows* in 1997. Gov. Br. 7. Of course, the Governor never explains how intervening elections in District 3 could have been held since 1997 if District 3's *Shaw* "infirmity" had never been remedied (or how this Court would have jurisdiction to remedy that long-ago violation). *See id.*

Unsurprisingly, the Governor's cursory revisionist history omits crucial events. In *Moon*, this Court enjoined Virginia "from coordinating and/or conducting an election" in District 3 "until such time as the General Assembly enacts, and the Governor approves, a new redistricting plan for said district which conforms to all requirements of law, including the Constitution of the United States." 952 F. Supp. 1141, 1151 (E.D. Va. 1997) (three-judge court). Thus, the remedial plan adopted by the Legislature in 1998 must have been constitutional because it was used for elections in District 3 *without challenge* by any party or restraint from this Court. The 1998 plan also served as the basis for the 2001 Benchmark Plan, which Virginia again used without a single *Shaw* challenge to District 3 for an entire decade. Given this history, it was especially sensible for the Legislature to preserve District 3's shape and basic demographics in the Enacted Plan.

Thus, the Governor's contention that District 3 "has been ruled unconstitutional as a racial gerrymander each time that it has been judicially reviewed," Gov. Br. 7, ignores that District 3 has been used without challenge for most of its history. In fact, in 2001 Virginia voters brought *Shaw* challenges against several state legislative districts, but

eschewed any such challenge to District 3. *See Wilkins v. West*, 264 Va. 447 (2002).[3]

Second, the Governor peddles more revisionist history when he contends—with a straight face—that, in 2012, the Legislature somehow preferred a plan other than the Enacted Plan it adopted into law. *See* Gov. Br. 12-13. The Governor points to a single pre-enactment statement from Senator Stephen Martin expressing reservations about District 3, *see id.* 13, but any such stray statement by a single legislator is not more probative of the Legislature's preference than its actual adoption of the Enacted Plan. In all events, the Governor neglects to mention that Senator Martin actually voted *for* the Enacted Plan in 2012. *See* HB 251, 2012 Session, *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?121+vot+SV0046HB0251+HB0251 (last visited Oct. 2, 2015).

The Governor's assertion that the Legislature "gave favorable consideration to another plan proposed by" Senator Locke in 2011, Gov. Br. 13, again ignores that the Legislature *rejected* Senator Locke's plan in favor of the Enacted Plan. And the Governor is simply incorrect that the Republican-controlled Legislature's "only" concern with Senator Locke's 2011 plan was that "it would not receive preclearance," *id.*: that plan also converted majority-Republican District 4 into a majority-black and

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[3] Moreover, even a cursory review of the 1991 version of District 3 challenged in *Moon* and Enacted District 3 refutes the Governor's suggestion that Enacted District 3 "retains the same basic shape it has had since 1991." Gov. Br. 4; *compare* Int.-Def. Ex. 8 (1991 District 3 Map), *with* Int.-Def. Ex. 3 (Enacted District 3 Map).

super-majority 68.2% Democratic district that harmed Republican incumbent Congressman Forbes, *see* M. Locke Plan, *available at* http://redistricting.dls.virginia.gov/2010/Data/congressional%20plans/SB5004_Locke_substitute/SB5004_Locke_substitute.pdf (last visited Oct. 2, 2015).

Third, citing *Abrams*, the Governor next argues that Enacted District 3 has a "broad geographic impact in high-population centers" because "the number of locality splits between CD-3 and CD-2 affected 241,096 people alone." Gov. Br. 9. But the Governor fails to mention that—as noted above—his plan has an even *broader* "geographic impact in high-population centers" on that metric: the locality splits between District 7 and the Governor's new race-conscious and identifiably black District 4 affect *827,385* people, or *3.4 times* as many people as the splits across Enacted Districts 2 and 3. *See* Gov. Plan Locality Splits. And if that were not enough, the Governor's plan also splits Chesapeake between Districts 2 and 4 in a way that alone affects another 222,209 people. *See id.* (In any event, the Enacted Plan's effect on *adjacent* districts cannot possibly justify the Governor's *statewide* redraw.)

Finally, the Governor invokes "the racial bloc voting analysis conducted by Dr. Lisa Handley," which purportedly "confirms that CD-3 does not need a majority African American district in order to ensure the opportunity for minority voters to elect candidates of their choice." Gov. Br. 8. Dr. Handley's analysis, however, only confirms the folly of relying upon a flawed and debatable racial bloc voting analysis in drawing District 3. Dr. Handley's analysis concluded that "a BVAP from between 30%

and 34% is what is required to prevent retrogression in CD-3." *Id.* 11. However, as Intervenor-Defendants previously have explained without dispute, such a massive reduction in District 3's BVAP to that level would almost certainly have been denied Justice Department preclearance in 2012. *See* Int.-Def. Resp. Br. Re *Alabama* 16 (DE 151).

Thus, Dr. Handley's racial bloc voting analysis, like the analysis Dr. McDonald presented at trial, was at best "controverted" and "unclear" evidence that would not have supplied the Legislature with "good reason[] to believe" that reliance on racial bloc voting analyses, and the massive reductions in BVAP they require, was a straightforward, or even feasible, means of obtaining Section 5 preclearance. *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1273-74 (2015). A racial bloc voting analysis therefore cannot condemn the Enacted Plan or justify any particular remedial plan. *See* Int.-Def. Resp. Br. Re *Alabama* 13-17. Indeed, the Governor's plan *violates* Dr. Handley's analysis, because it increases District 4's BVAP from 31.3%, which is well within Dr. Handley's electable range of "30% [to] 34%" BVAP, Gov. Br. 11, to *48%* BVAP, thus gratuitously "packing" District 4 by 14-18% BVAP. And it provides District 3 with a BVAP of 41.9%, which is also well above the 30%-34% level purportedly "required to prevent retrogression in CD-3." Gov. Br. 11.

Moreover, even the Governor recognizes that "reducing CD-3's BVAP from 56% to around 35% would require" a racially motivated "shifting [of] approximately 150,000 voting-aged African Americans out of CD-3 and into the surrounding Congressional districts, while absorbing another,

non-African American group of 150,000 voters from surrounding districts." *Id.* 12. Thus, any attempt to lower District 3's BVAP to Dr. Handley's level would inject even *more* race-consciousness into the plan. And, of course, it would do direct violence to Virginia's traditional districting principle of preserving district cores. *See Wilkins*, 264 Va. at 474, 476.

Thus, in sum, the Court should reject the Governor's plan and his invitation to "embrace a comprehensive redrawing of Virginia's congressional districts," in order to *reverse* the choices made by the democratically elected Legislature in 2012. Gov. Br. 13.

C. The NAACP Plan Is A Racially Motivated Plan That Contravenes The Legislature's Redistricting Priorities

The NAACP plan is a racially motivated plan that suffers many of the same infirmities as the Governor's plan. This is unsurprising: the NAACP plan is based on the 2011 Locke plan that the Legislature rejected when it adopted the Enacted Plan in 2012. *See* NAACP Br. 4 (DE 227). The NAACP concedes that the purpose of its plan is to "redraw the state's third and fourth congressional districts" along racial lines in order to create 2 districts where "African-American voters have the opportunity to elect their candidates of choice." *Id.* 3. The NAACP plan drops District 3's BVAP to 42.1%, NAACP Plan VAP (Ex. E), 8 whole percentage points below the 50.1% "majority-minority" level in Alternative District 3 that this Court endorsed, Op. 28-32. The NAACP plan effects this precipitous drop in District 3's BVAP to turn District 4 into a 50.8%

black-majority district. *See* NAACP Plan VAP; NCAAP Br. 3, 8-10. The NAACP invokes "Section 2" of the Voting Rights Act as a basis for this race-based remedy, NAACP Br. 3, even though no party has pled or proven a Section 2 violation here, *see Bartlett*, 556 U.S. 1.

The NAACP plan, moreover, is broader than necessary to cure the violation and contravenes the Legislature's redistricting priorities in the following ways:

- The NAACP plan redraws 7 of Virginia's 11 congressional districts, including 2 districts—Districts 5 and 6—that do not border District 3. *See* NAACP Br. Ex. A; NAACP Plan Core Preservation (Ex. F).
- The NAACP plan replaces the Legislature's 8-3 Republican split with a 7-4 split by turning District 4 into a 68.2% supermajority-Democratic district. *See* NAACP Plan Election Data (Ex. G). It also makes District 5 a more closely divided district, increasing its Democratic vote share from 47.3% to 48.5%. *See id.*
- The NAACP plan therefore fails to protect incumbent Republican Congressman Forbes in District 4 and harms incumbent Republican Congressman Hurt in District 5, while protecting all Democratic incumbents. *See id.*
- The NAACP plan preserves only between 51% and 90.2% of the cores of the Benchmark Districts, and only 53.2% of District 3's core. *See* NAACP Plan Core Preservation.
- The NAACP plan splits 14 localities, the same

number as the Enacted Plan and more than the Alternative Plan and Intervenor-Defendants' Proposed Remedial Plan 1 and Proposed Remedial Plan 2. *See* NAACP Plan Locality Splits (Ex. H).

- The NAACP plan's split between Districts 2 and 3 affects the 437,994 people in Virginia Beach, nearly 200,000 *more* people than are affected by the Enacted Plan's splits across Districts 2 and 3. *See id.*
- The NAACP plan splits localities that are not split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans, such as Chesapeake, Culpeper, Dinwiddie, Gloucester, Lynchburg, Mecklenburg, and Virginia Beach. *See id.*

The NAACP spills considerable ink arguing that its proposed remedial plan unites communities of interest in Districts 3 and 4. *See* NAACP Br. 10-16. But the Legislature rejected the 2011 Locke plan upon which the NAACP plan is based, *see id.* 4, and instead opted for the Enacted Plan, which preserves different communities of interest around the Benchmark Districts. *See* Pl. Trial Ex. 5, at 1-2. The Court should defer to the Legislature's redistricting priorities and reject the NAACP's naked effort to reverse the outcome of the 2012 legislative session.

D. The Other Non-Party Proposed Remedial Plans Are Overbroad And Violate The Legislature's Redistricting Priorities

The Court should also reject the remaining non-party proposed remedial plans because they fail to comply with the Court's Order, are broader than

"necessary to cure" the constitutional defect in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, contravene "the legislative policies underlying" the Enacted Plan, *Perez*, 132 S. Ct. at 941—or all of the above.

Petersen Plan. The Court should reject the plan submitted by Senator J. Chapman Petersen, *see* DE 219, because Senator Petersen did not serve "Shapefiles and Block Equivalency Files" for his plan on "counsel of record" for Intervenor-Defendants, Order ¶ 4 (DE 221). In all events, the Petersen plan is not an appropriate judicial remedy here.

- The Petersen plan violates the Constitution's equal-population requirement. The Constitution requires that all congressional districts be drawn within a +1/-1 deviation from the ideal district population. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964). The Petersen Plan, however, has a +10/-13 population deviation. *See* Petersen Plan Charts at 1 (Ex. I).
- The Petersen plan redraws every district in the Commonwealth, not merely District 3 and surrounding districts. *See* Petersen Plan Core Preservation (Ex. J); Petersen Br. Ex. 1.
- The Petersen plan creates a statewide Democratic partisan gerrymander, replacing the Legislature's preferred 8-3 Republican split with a 6-5 pro-Democratic split. *See* Petersen Plan Charts at 4 (Ex. I). In particular, the Petersen Plan turns Districts 1, 2, and 10 into majority-Democratic districts. *See id.*

- The Petersen plan thus harms Republican incumbents Congressmen Rigell and Forbes by placing them in renumbered Districts 1 and 2 while turning another previously Republican district into a majority-Democratic district, even though it protects all Democratic incumbents. *See id.*; Petersen Plan Incumbents (Ex. K).
- The Petersen plan also harms incumbents by pairing Congressmen Goodlatte, Hurt, and Griffith in District 6 and Congresswoman Comstock and Congressman Gerry Connolly in District 11, while placing no incumbent in Districts 7, 9, or 10. *See* Petersen Plan Incumbents (Ex. K).
- The Petersen plan sets District 3's BVAP to 50.4%, above the Court's constitutional benchmark of 50.1%. *See* Petersen Plan Charts at 3 (Ex. I).
- The Petersen plan preserves between only 40.5% and 78.9% of the cores of the Benchmark Districts, and only 46.1% of District 3's core. *See* Petersen Plan Core Preservation (Ex. J).
- The Petersen plan splits 29 localities affecting population, more than double the number of locality splits in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans. *See* Petersen Plan Split Localities (Ex. L).
- The Petersen plan splits several localities that are not split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans,

including Albemarle, Amherst, Augusta, Bedford City, Botetourt, Colonial Heights, Dinwiddie, Hanover, Hopewell, Lancaster, Loudoun. Louisa, Middlesex, Montgomery, Nelson, Nottoway, Rockbridge, and Virginia Beach. *See id.*

Richmond First Club Plan. The Court should reject the Richmond First Club plan, *see* DE 218, because the Richmond First Club did not serve "Shapefiles and Block Equivalency Files" for its plan on "counsel of record" for Intervenor-Defendants, Order ¶ 4. The Richmond First Club Plan is the J. Miller plan drawn by a William & Mary law student team that the Legislature considered—and rejected—as SB 5003 in 2012. *See* DE 218. It is not an appropriate judicial remedy here for several more reasons.

- The Richmond First Club plan redraws every district in the Commonwealth. *See* SB 5003 Core Preservation (Ex. M); DE 218-2.
- The Richmond First Club plan replaces the Legislature's preferred 8-3 partisan split with a 6-5 Republican split. *See* SB 5003 Charts at 4 (Ex. N). In particular, the Richmond First Club Plan turns District 8 (which it renumbers District 1) and District 7 (which it renumbers District 5) into majority-Democratic districts. *See id.*
- The Richmond First Club plan thus harms at least two Republican incumbents. *See id.*
- The Richmond First Club plan also harms incumbents by pairing Congresswoman Comstock and Congressman Don Beyer in

District 1, Congressmen Forbes and Rigell in District 4, Congressmen Brat and Hurt in District 7, and Congressmen Goodlatte and Griffith in District 8, while placing no incumbent in Districts 5, 6, 9, or 11. *See* SB 5003 Incumbents (Ex. O).

- The Richmond First Club plan preserves between 39.5% and 89.3% of the cores of districts, and only 43.6% of the core of its majority-black District 3. *See* SB 5003 Core Preservation (Ex. M).
- The Richmond First Club plan splits 19 localities affecting population, more than the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans. *See* SB 5003 Locality Splits (Ex. P).
- The Richmond First Club plan's splits of Hampton, Newport News, Norfolk between District 2 and its majority-black District 3 affect 560,958 people, while its splits of Virginia Beach and Portsmouth between District 3 and District 4 affect 533,529 people. *See id.*
- The Richmond First Club plan splits localities that are not split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans, including Amherst, Caroline, Chesapeake, Colonial Heights, Gloucester, King and Queen, Loudoun, Louisa, Middlesex, Montgomery, and Virginia Beach. *See id.*

Rapoport Plan. The Court may not enter as a remedy the plan submitted by Jacob Rapoport, *see* DE 228, for several reasons.

- The Rapoport plan replaces the Legislature's preferred 8-3 partisan split with a 7-4 Republican split. *See* Rapoport Plan Election Data (Ex. Q). In particular, the Rapoport Plan turns District 4 into a majority-Democratic district. *See id.*
- The Rapoport plan leaves no incumbent in District 4 but pairs incumbent Republican Congressmen Rigell and Forbes in District 2, while it protects all Democratic incumbents. *See* Rapoport Plan Incumbents (Ex. R).
- The Rapoport plan preserves between 46.2% and 90.2% of the cores of districts, and only 47.3% of District 3's core. *See* Rapoport Core Preservation (Ex. S).
- The Rapoport plan sets District 3's BVAP to 50.9%, above the Court's constitutional benchmark of 50.1%. *See* Rapoport Plan VAP (Ex. T).
- The Rapoport plan splits King William, which is not split in the Enacted Plan, Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans. *See* Rapoport Map (DE 228-1).

Bull Elephant Media Plans. The Court should reject the Bull Elephant Media plans, *see* DE 222, because Bull Elephant Media did not serve "Shapefiles and Block Equivalency Files" for its plans on "counsel of record" for Intervenor-Defendants, Order ¶ 4. Moreover, by its own admission, the Bull

Elephant Media plans are drawn to a deviation of "less than 1,000 people," Bull Elephant Media Br. 2-3, so they violate the Constitution's equal-population requirement, *see Wesberry*, 376 U.S. 1. These plans also fail to meet the Court's constitutional benchmark because they draw District 3 to 53.1% and 52.1% BVAP respectively. *See* Bull Elephant Media Br. 2-4.

Garrett Plan. The Court should reject the plan submitted by Donald Garrett, *see* DE 238, because it proposes creating 11 at-large districts comprising "[t]he entirety of the Commonwealth of Virginia," *id.* 1-2, in contravention of the Legislature's decision to create 11 single-member districts, *see* Pl. Ex. 5. Mr. Garrett, moreover, does not explain how his at-large plan could comply with Virginia's obligations under the Voting Right Act. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 47 ("This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population.").

CONCLUSION

The Court should reject all other plans and enter one of Intervenor-Defendants' proposed remedial plans if a judicial remedy becomes necessary in this case.

Dated: October 7, 2015 Respectfully submitted,

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No. 14-1504

In The Supreme Court of the United States

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Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

SUPPLEMENTAL BRIEF OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES

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October 13, 2015

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SUPPLEMENTAL QUESTION PRESENTED

On September 28, 2015, the Court ordered the parties to file supplemental briefs addressing the following question:

> Whether appellants have standing under Article III of the United States Constitution.

TABLE OF CONTENTS

	Page
SUPPLEMENTAL QUESTION PRESENTED....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
GLOSSARY	iv
INTRODUCTION	1
ARGUMENT	4
One or more of the Congressmen might have appellate standing, but they have not yet alleged an injury in fact	4
CONCLUSION.....	10

TABLE OF AUTHORITIES

Page

CASES

Ala. Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 6

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 5, 6

Bond v. United States,
131 S. Ct. 2355 (2011) 7, 8

Diamond v. Charles,
476 U.S. 54 (1986) 7

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 5, 6, 7, 10

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 6

Powers v. Ohio,
499 U.S. 400 (1991) 7

Sinkfield v. Kelley,
531 U.S. 28 (2000) 5

Spencer v. Kemna,
523 U.S. 1 (1998) 8

United States v. Hays,
515 U.S. 737 (1995) 4, 5, 7

United States v. Windsor,
133 S. Ct. 2675 (2013) 4

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III 5, 7, 10

U.S. Const. amend. XIV 5

GLOSSARY

BVAP	Black Voting-Age Population
CD#	Virginia Congressional District No.
The Congressmen	Appellants Robert J. Wittman, Bob Goodlatte, J. Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf
JS	Jurisdictional Statement
PX	Plaintiffs' Trial Exhibit No.

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INTRODUCTION

Several events have occurred since briefs were last filed.

On August 5, 2015, the district court denied the motion of the Virginia House of Delegates and the Virginia Senate to postpone the deadline for the Virginia General Assembly to draw new congressional districts.[1] Those houses, neither of which intervened

[1] Order, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678 (E.D. Va. Aug. 5, 2015), ECF No. 201.

as a party, had sought to postpone the remedial deadline from September 1 until November 16, 2015.[2] The State Board of Elections opposed that extension because, among other reasons, the Governor had called a special session for August 17, 2015, and the proposed mid-November deadline would restrict the time needed for a judicial remedy, if the legislative effort failed, unduly compressing the 2016 election cycle.[3] In denying the motion, the district court ruled that the two houses had failed to show that the Congressmen were likely to succeed on their appeal here or that the houses would suffer irreparable injury by adhering to the September 1 deadline. Judge Payne dissented and would have granted the extension.

The General Assembly convened on August 17, 2015 to address congressional redistricting, but the Senate adjourned sine die, without agreement on a plan.

On September 3, after the legislature's deadline had passed, the court announced that it would appoint a special master to assist the court in redrawing the lines, and the court directed the parties to suggest

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[2] Mem. in Supp. of Interested Parties' Va. House of Delegates' and Va. Senate's Mot. for an Extension of Time to Comply with this Court's June 5, 2015 Order, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678 (July 15, 2015), ECF No. 193.

[3] Defs.' Br. in Opp'n to Va. House of Delegates' and Va. Senate's Mot. for an Extension of Time to Comply with this Court's June 5, 2015 Order, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678 (July 29, 2015), ECF No. 199.

candidates.[4] The court also imposed deadlines of September 18—for the parties, as well as any interested non-parties, to submit proposed redistricting plans—and October 2 (later extended until October 7), for comments on such plans.

On September 18, the Governor, a State Senator, the Congressmen, and the plaintiffs each submitted proposed redistricting plans. Proposed remedial plans also were submitted by various non-parties.[5]

On September 25, after the parties agreed on two candidates,[6] the court appointed Dr. Bernard Grofman as special master.[7] The appointment order directed Dr. Grofman to review the various submissions and to "recommend to the Court a proposed plan, a modified version of a proposed plan, or a plan devised by the Special Master, that remedies the deficiencies identified in the Court's June 5, 2015 opinion."[8] The court directed the special master to submit his report and recommendation by October 30, 2015. The court also

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[4] Order, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 3, 2015), ECF No. 207.

[5] The Virginia Division of Legislative Services has posted the submissions at http://redistricting.dls.virginia.gov/2010/court-ordered-redistricting.aspx.

[6] Second Agreed Submission Regarding Proposed Candidates for Special Master, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 18, 2015), ECF No. 224.

[7] Order, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 25, 2015), ECF No. 241.

[8] *Id.* ¶ 1.

set a briefing schedule for comments by parties and by non-parties to enable the court to "adopt a redistricting plan at the earliest practical opportunity after November 17, 2015."[9]

ARGUMENT

One or more of the Congressmen might have appellate standing, but they have not yet alleged an injury in fact.

"There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution."[10] The plaintiffs are voters in Virginia's Third Congressional District and claimed injury as a result of the General Assembly's alleged use of race as the predominant factor in drawing CD3. Accordingly, the plaintiffs stated a valid Equal Protection claim. As this Court held in *United States v. Hays*, "[w]here a plaintiff resides in a racially gerrymandered district . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action."[11]

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[9] *Id.* ¶ 2.

[10] *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013).

[11] 515 U.S. 737, 744-45 (1995).

But *Hays* also established that voters in districts that *adjoin* a racially gerrymandered district normally lack standing to complain, even though the shapes of their districts "were necessarily influenced by the shapes of the majority-minority districts upon which they border."[12] "[A]bsent specific evidence" that the adjoining-district plaintiff "has personally been subjected to a racial classification," that "plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve."[13] So despite that the racial composition in the adjoining district "would have been different," but for the racially gerrymandered district, "an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment."[14]

Article III's standing requirement must be met "'by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'"[15] "To have standing, [the appellant] must seek relief for an injury that affects him in a 'personal

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[12] *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam) (discussing *Hays*).

[13] *Hays*, 515 U.S. at 745.

[14] *Id.* at 746.

[15] *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

and individual way.'"[16] The appellant "must possess a 'direct stake in the outcome' of the case."[17]

Since none of the Congressmen—appellants here—lives in CD3, none would have had standing in the district court to complain about that district's composition, even though the composition of CD3 necessarily affected the composition of one or more of the adjoining districts. But the question of appellate standing differs from the plaintiffs' standing in the district court.

As explained in our motion to affirm, the Commonwealth did not appeal the district court's judgment invalidating Virginia's 2012 congressional redistricting plan. In our view, in light of *Alabama Legislative Black Caucus v. Alabama*,[18] the district court's finding that CD3 was racially gerrymandered was supported by substantial evidence that the legislature impermissibly used a 55% BVAP floor, a finding that cannot be considered "clearly erroneous" under the applicable standard of appellate review.[19]

When, as in this case, the State has chosen not to appeal, the Congressmen, as appellants, must

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[16] *Id.* at 2662 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

[17] *Id.* (quoting *Arizonans for Official English*, 520 U.S. at 64).

[18] 135 S. Ct. 1257 (2015).

[19] *See* Mot. to Affirm by Va. State Bd. of Elections Appellees at 2-3, 23-29 (July 22, 2015).

demonstrate standing in their own right.[20] They "'must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.'"[21]

It might be tempting to suppose that, since the Congressmen do not live in CD3, they have not suffered an injury in fact for a racial gerrymandering claim under *Hays*. But that would conflate what is needed to establish standing to assert a racial gerrymandering claim with what an appellant must show to have standing to challenge a judgment on appeal. *Bond v. United States* teaches that, once an appellant satisfies the injury-causation-and-redressability requirements to establish standing, Article III does not restrict the legal grounds that may be asserted to win relief.[22] Thus, in *Bond*, this Court held that the appellant had standing to challenge the statute under which she was convicted on the ground that it unconstitutionally abridged the powers of the States, even though no State was a party to the proceeding. "Bond's challenge to her conviction and sentence 'satisfie[d] the case-or-controversy requirement, because

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[20] *Hollingsworth*, 133 S. Ct. at 2662-63; *Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.").

[21] *Hollingsworth*, 133 S. Ct. at 2663 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

[22] 131 S. Ct. 2355, 2361-62 (2011).

the incarceration . . . constitute[d] a concrete injury, caused by the conviction and redressable by invalidation of the conviction.'"[23]

In this case, the Congressmen base their appellate standing on the ground that remedying CD3 will necessarily alter one or more of the appellants' adjoining districts—CD1 (Robert J. Wittman); CD2 (Scott Rigell); CD4 (J. Randy Forbes); and CD7 (David Brat). As they put it:

> Any remedy must therefore move such voters *out* of District 3 and into one or more of the surrounding Republican districts, and an equal number of (white) voters into District 3. Thus, any remedy approved by the . . . court, will necessarily alter districts where Appellants have previously been elected.
>
> Such changes will be particularly injurious because they will undo an Appellant's recommendations for his district, replace a portion of "his base electorate" with unfavorable Democratic voters, and harm Appellants as Republican voters.[24]

While the Congressmen *might* be able to allege facts sufficient to demonstrate appellate standing, their allegations to date are inadequate. It is still unknown what remedial plan the district court will

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[23] *Id.* at 2362 (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

[24] Br. Opposing Appellees' Mots. to Dismiss or Affirm at 12 (Aug. 4, 2015).

implement; the special master has until October 30 to propose one.

Notably, the two remedial plans proposed by the Congressmen make relatively small changes to CD3 and the adjoining districts. The Congressmen themselves tout their proposed changes as "narrowly drawn to fix the defect in Enacted District 3 identified by the Court and to give effect, to the greatest extent practicable, to the Legislature's overarching priorities of incumbency protection and preservation of cores to maintain the 8-3 partisan division established in the 2010 election."[25] Although the district court rejected the Congressmen's claim that the purpose of the 2012 plan was to entrench an 8-3 Republican-Democrat split in Virginia's congressional delegation,[26] the point here is simply that the Congressmen in the districts adjoining CD3 have not yet identified any concrete injury that *they* would suffer if the court accepts their remedial plan.

The Congressmen's claim that *any* remedial plan would differ from the one they expected likewise fails to establish a concrete injury. That claim is also foreclosed by their interrogatory answers, which

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[25] Intervenor-Defs.' Br. in Supp. of Their Proposed Remedial Plans at 2, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 18, 2015), ECF No. 232.

[26] *See* JS 16a n.12 (majority ruling rejecting 8-3-split theory); Mot. to Affirm by Va. State Bd. of Elections Appellees at 30-35.

asserted that they had no input into the enacted plan and no knowledge about how it was formulated.[27]

CONCLUSION

Although Appellants ultimately may be able to demonstrate appellate standing, they have not yet articulated an injury in fact sufficient to satisfy Article III.

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[27] PX 34 at 1-2 (answer of Rep. Forbes—CD4—that he provided no feedback on the enacted redistricting plan); PX 38 at 1-2 (answer of Rep. Rigell—CD2—identifying no substantive input for the enacted plan); PX 39 at 1-2 (answer of Rep. Wittman—CD1—same). As for CD7, previously held by Representative Cantor, Representative Brat was elected in 2014, after the 2012 plan was adopted. *See also* Mot. to Affirm by Va. State Bd. of Elections Appellees at 31-32 & nn.151-53. Once Cantor lost his office, he "lost standing." *Hollingsworth*, 133 S. Ct. at 2665.

No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. BACKGROUND	1
II. LEGAL STANDARD	5
III. ARGUMENT	7
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page(s)
Alabama Legislative Black Caucus v. Alabama, 135 S.Ct. 1257 (2015)	2, 3, 8
Allen v. Wright, 468 U.S. 737 (1984)	6
Already, LLC v. Nike, Inc., 133 S. Ct. 721 (2013)	6
Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)	6
Diamond v. Charles, 476 U.S. 54 (1986)	6, 7
Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)	5, 6, 7, 10
Johnson v. Mortham, 915 F. Supp. 1529 (N.D. Fla. 1995)	8, 9
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	6, 7, 11, 14
Raines v. Byrd, 521 U.S. 811 (1997)	5
Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976)	6
United States v. Hays, 515 U.S. 737 (1995)	8, 10, 14
Whitmore v. Arkansas, 495 U.S. 149 (1990)	6
CONSTITUTION	
U.S. Const. art. III	*passim*
U.S. Const. amend. XIV	1

TABLE OF AUTHORITIES

OTHER AUTHORITIES — Page(s)

Intervenor-Defendants' Brief In Support of Their Proposed Remedial Plans, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 18, 2015), ECF No. 232 ..... 5, 11

Jurisdictional Statement, *Cantor v. Personhuballah* (U.S. Oct. 31, 2014) (No. 14-518)... 2

Motion for Extension of Time to Comply With Court Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. July 15, 2015), ECF No. 192 3-4

Motion to Dismiss or Affirm, *Cantor v. Personhuballah* (U.S. Dec. 4, 2014) (No. 14-518)... 2, 3

Order Denying Motion for Extension of Time, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Aug. 5, 2015), ECF No. 201..... 4

Order Granting Motion to Intervene, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. May 11, 2015), ECF No. 165 2

Order Granting Motion to Intervene, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Dec. 3, 2013), ECF No. 26 2

Order List, 576 U.S. ___ (Sept. 28, 2015)..... 5

Order Regarding Proposed Remedial Plans, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 23, 2015), ECF No. 237..... 4

Order Vacating & Remanding Case, *Cantor v. Personhuballah* (U.S. Mar. 30, 2015) (No. 14-518) 2

TABLE OF AUTHORITIES—Continued

Page(s)

Scheduling Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Apr. 2, 2015), ECF No. 144 3

Scheduling Order, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 3, 2015), ECF No. 207 4

SUPPLEMENTAL BRIEF FOR APPELLEES GLORIA PERSONHUBALLAH AND JAMES FARKAS

This supplemental brief, filed pursuant to the Court's Order issued September 28, 2015, addresses the following question:

> Whether Appellants, Republican current and former members of Congress who intervened as Defendants in the action below, none of whom live in, currently represent, or have ever represented the *only* congressional district at issue in this racial gerrymandering action, have standing under Article III of the U.S. Constitution to pursue this appeal, when the State Defendants have not sought appellate review.

For the reasons that follow, Appellants do not have standing and this appeal should be dismissed.

I. BACKGROUND

This action was originally filed on October 2, 2013, by voters who reside in Virginia's bizarrely-shaped Third Congressional District ("CD3"). Appellants are current and former Republican members of Congress who represent or represented the following districts: CD1 (Robert J. Wittman), CD2 (Scott Rigell), CD4 (Randy J. Forbes), CD5 (Robert Hurt), CD6 (Bob Goodlatte), CD7 (David Brat, current; Eric Cantor, former), CD9 (Morgan Griffith), and CD10 (Barbara Comstock, current; Frank Wolf, former). Appellants were not named as Defendants, but intervened below to defend against the voters' claim that CD3 is a racial gerrymander in violation of the Equal Protection

Clause of the Fourteenth Amendment.[1]

On October 7, 2014, after a trial, the district court, constituted as a three-judge panel (the "Panel"), issued an opinion finding CD3 to be an unconstitutional racial gerrymander. Appellants—but not the originally named State Defendants—sought direct review of this Court. *See* Jurisdictional Statement, *Cantor v. Personhuballah* (U.S. Oct. 31, 2014) (No. 14-518). Virginia voter Appellees Gloria Personhuballah and James Farkas (the "Voter Appellees") filed a motion to dismiss or affirm the appeal, in which they argued (among other things) that Appellants lacked Article III standing. *See* Mot. to Dismiss or Affirm, *Cantor v. Personhuballah* (U.S. Dec. 4, 2014) (No. 14-518). While that motion was pending, the Court decided *Alabama Legislative Black Caucus v. Alabama*, which held that a three judge panel reviewing a racial gerrymandering claim in Alabama had "applied incorrect legal standards in evaluating the claims." 135 S. Ct. 1257, 1262 (2015). Shortly thereafter, the Court vacated and remanded the Panel's decision "for further consideration in light of" the opinion in *Alabama*. Order Vacating & Remanding Case, *Cantor v. Personhuballah* (U.S. Mar. 30, 2015) (No. 14-518).[2]

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[1] Cantor, Wittman, Goodlatte, Wolf, Forbes, Griffith, Rigell and Hurt intervened as Defendants in December 2013. Order Granting Mot. to Intervene, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Dec. 3, 2013), ECF No. 26. Wolf announced his retirement in December 2013, and Cantor was defeated in the Republican primary by Appellant Brat in June 2014. Brat and Comstock (who won the seat that Wolf previously held) intervened when the case was before the court below on remand. Order Granting Mot. to Intervene, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. May 11, 2015), ECF No. 165.

[2] The Court's order vacating and remanding the Panel's original decision expressed no opinion on the substantive issues raised

Upon remand, the Panel ordered the parties to "file briefs regarding the effect, if any," of the *Alabama* decision "on this case." Scheduling Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Apr. 2, 2015), ECF No. 144. On June 5, after consideration of that briefing and expressly applying *Alabama*, the Panel again concluded that CD3 was an unconstitutional racial gerrymander. *See* JS 13a & n.11, 39a-42a, 43a. The Panel enjoined any further elections under the current congressional apportionment plan and gave Virginia's General Assembly until September 1 to adopt a remedial plan. JS 94a.

Again, Appellants sought review of the Panel's decision, filing a jurisdictional statement on June 22. And again, the Voter Appellees filed a motion to dismiss or affirm, which argued, among other things, that Appellants lack Article III standing to independently pursue this appeal. *See* Voter Appellees' Mot. to Dismiss or Affirm, at 6-8. The State Defendants not only did not join Appellants in the appeal; they filed a motion requesting that the Court affirm the Panel's decision. *See* Mot. to Affirm by Va. State Bd. of Elections Appellees.

Since Appellants' jurisdictional statement and the motions to affirm or dismiss have been filed, several important things have occurred. *First*, the Virginia House of Delegates and Virginia Senate moved in the

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by the parties, including the issue of Appellants' standing. This approach is consistent with the prohibition on advisory opinions and the canon of constitutional avoidance. If the Panel found that application of *Alabama* dictated a different result, the Court would have no need to decide whether Appellants could maintain a direct appeal without participation of the State Defendants. And, because the State Defendants had standing to defend the action before the Panel, Appellants' lack of standing would not require dismissal of the district court action.

district court to extend the deadline for approval of a remedial plan from September 1 to November 16. Mot. for Extension of Time to Comply With Court Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. July 15, 2015), ECF No. 192. That motion was denied on the grounds that the movants "failed to show that (1) the [Appellants] are likely to succeed in the appeal pending before the Supreme Court, or (2) they will suffer irreparable injury or prejudice by adhering to the Court's September 1, 2015 [deadline] for adopting a new redistricting plan." Order Denying Mot. for Extension of Time, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Aug. 5, 2015), ECF No. 201. *Second*, although the Governor of Virginia convened the General Assembly for a special session in August 2015 for the purposes of drawing and approving a new plan, the legislature did not pass a new map.

As a result, the Panel has undertaken the process of approving a remedial plan itself. To assist it, the Panel set a deadline of September 18 for anyone who wished to submit proposed remedial plans for consideration, with all "briefs or other written comments to the proposed plans, maps, and briefs" due October 7. Scheduling Order, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 3, 2015), ECF No. 207. Appellants submitted two maps, the Voter Appellees submitted one, and outside groups and individuals who were not previously party to these proceedings submitted several more.[3]

Appellants describe the plans that they have submitted as being "narrowly drawn to fix the defect in

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[3] All of the proposed plans are available on Virginia's Division of Legislative Services (DLS) website, per the Panel's express order. *See* Order Regarding Proposed Remedial Plans, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 23, 2015), ECF No. 237.

[CD3] identified by the Court" while at the same time protecting incumbents "to maintain the 8-3 partisan division established in the 2010 election." Intervenor-Defendants' Br. In Support of Their Proposed Remedial Plans 2, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 18, 2015), ECF No. 232. Specifically, Appellants' remedial plans would reduce the Republican vote share in CD2, currently represented by Congressman Rigell by "only 0.6%," *id.* at 13, and "preserve the majority-Republican vote share in the 7 other districts . . . represented by [the other Appellants currently serving as Republican members of Congress]," *id.* at 13-14.

On September 28, this Court issued an order directing the parties "to file supplemental briefs addressing" the question of "[w]hether appellants have standing under Article III of the United States Constitution." Order List, 576 U.S. ___ (Sept. 28, 2015). For the reasons that follow, the Court should answer that question in the negative, and dismiss this appeal.

II. LEGAL STANDARD

Article III of the Constitution limits the jurisdiction of federal courts to matters that present "cases" or "controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). Rather, all litigants must be able to demonstrate that they (1) have suffered "a concrete and particularized injury," (2) this injury "is fairly traceable to the challenged conduct," and (3) this injury "is likely to be redressed by a favorable judicial decision." *Id.* at 2661

(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). *See also id.* ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.'") (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

A litigant cannot satisfy Article III by asserting any possible conceivable harm that might follow from the adjudication of a matter. They must be able to show that they have an "injury in fact," by which is meant "an invasion of *a legally protected interest*" that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984), and *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (emphasis added). Moreover, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action . . . . and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). *Cf. Diamond*, 476 U.S. at 70 (applying precedent "that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue" to defendant-intervenor's argument that he had standing to pursue appeal independent of state defendants).

Article III's case and controversy requirements apply to both plaintiffs and defendants and "persist throughout all stages of litigation." *Hollingsworth*, 133 S. Ct. at 2661 (citing *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("Standing to sue or *defend* is an aspect of the case-or-controversy requirement.") (emphasis added). Thus, an intervenor

may not necessarily need to establish Article III standing in the district court if another party with standing is participating in the case, but it cannot independently maintain an appeal without it when the party with standing chooses not to appeal. *Hollingsworth*, 133 S. Ct. at 2662. *See also Diamond*, 476 U.S. at 63-64 ("By not appealing the judgment below, the State indicated its acceptance of that decision . . . . The State's . . . failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State.").[4] At all stages of the litigation, the party seeking to invoke the Court's jurisdiction bears the burden of establishing that Article III standing exists. *Lujan*, 504 U.S. at 561.

III. ARGUMENT

The State Defendants have chosen not to appeal the Panel's decision, and Appellants do not have Article III standing to maintain this action without them, whether as former members of Congress who represented districts other than CD3, current members of Congress representing districts other than CD3, or "Republican voters." *See* Appellants' Br. Opposing Appellee's Motions to Dismiss or Affirm ("Appellants' Opp. Br."), at 12 (arguing that any alteration of CD3 "will be particularly injurious because they will undo an Appellant's recommendations for his district,

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[4] The U.S. Courts of Appeal are divided as to whether intervenors must independently establish Article III standing to participate in a litigation before a district court and the Court has thus far declined to reach that question. *See Diamond*, 476 U.S. at 68-69 & n.21. The Court need not consider that question here, as it is not presented by the present appeal.

replace a portion of 'his base electorate' with unfavorable Democratic voters, and harm Appellants as Republican voters"). That Cantor and Wolf cannot maintain this appeal based on their status as *former* members of Congress should be self-evident and require no further discussion. But Appellants' assertion that they have constitutionally cognizable injuries because the Panel *may* adopt a map remediating the racial gerrymander in CD3 that, in turn, *could* change the partisan composition of the voters in the district that they represent or in which they reside, and *potentially* ultimately endanger their chances for reelection or their interest as voters in maintaining an 8-3 Republican-Democrat divide among Virginia's congressional delegation, is equally unsustainable.

First, Appellants' position is directly contrary to the Court's long-standing precedent that, in a racial gerrymandering case, standing requires a "district-specific" and "personal" injury. *Alabama*, 135 S. Ct. at 1265. There is no defensible basis for a rule that provides that, while voters *challenging* a racial gerrymander must live in the district being challenged, voters or office holders *defending* a racial gerrymander may live anywhere in the Commonwealth. *Id.* (explaining racial gerrymandering claims "directly threaten a voter who lives in the *district* attacked," "[b]ut they do not so keenly threaten a voter who lives elsewhere in the State" and "the latter voter normally lacks standing to pursue a racial gerrymandering claim"). *See also United States v. Hays*, 515 U.S. 737, 739 (1995) (finding voters who "do not live in the district that is the primary focus" in a racial gerrymandering case lack standing).

The district court in *Johnson v. Mortham*, 915 F. Supp. 1529, 1537-38 (N.D. Fla. 1995), recognized as

much, holding that, of three congressional representatives that sought to intervene in a racial gerrymandering lawsuit, only the representative of the district challenged by the lawsuit had standing to do so. This is because a congressional representative from another district—just like a voter who resides in another district—has "no more than a generalized interest in [the] litigation since . . . the possibility of a remedy that would impair their interests in their congressional seat is no more than speculative." *Id.* at 1538. In reaching this decision, the court specifically considered and rejected the argument that a finding for the plaintiffs was likely to affect not just the challenged district, but other districts in the Florida congressional map. It expressly acknowledged that, "[u]ndoubtedly, a finding by the panel that the Third Congressional District is the product of unconstitutional gerrymandering would necessarily require the Florida Legislature to adopt a redistricting plan that would effectively abrogate the [current] plan—and might even result in the redrawing of [proposed intervenors'] districts." *Id.* at 1538. "Nevertheless," it held that the proposed intervenors did not meet Article III's standing requirements. *Id.*

To conclude otherwise would have been contrary to the precedent discussed above, which requires that a voter live in a district to challenge it as a racial gerrymander. This is because *the very nature of redistricting*—in which the drawing of one legally compliant district necessarily affects the drawing of other districts—means that whenever one district must be redrawn due to a constitutional deficiency, there will "undoubtedly" be some effect on other districts in the map. The voter who lives outside the challenged district has the same claim to injury as the member of Congress who represents another district

whose boundaries are "likely" to change if a racial gerrymandering claim is successful. Still, this Court has definitively held that the voter who lives in another district—even a *neighboring* district, such that "it may be true that the . . . composition of" the voter's district "would have been different if the legislature had drawn [the challenged district] in a another way,"—does not have standing to maintain a racial gerrymandering claim. *Hays*, 515 U.S. at 746. Simply put, Appellants are wrong to suggest (as they did in their reply to the motions to dismiss or affirm), that the standing restraints that apply to ordinary voters in relation to racial gerrymandering claims do not apply to either present or former members of Congress, or to "Republican voters." Appellants' Opp. Br. at 12.

Second, any harm that Appellants claim—whether as members of Congress who represent districts other than CD3 or Republican voters who reside in districts other than CD3—is too speculative to meet Article III's standing requirements. None of the Appellants have special legal authority for redistricting or the conduct of Virginian elections—those jobs belong to the General Assembly (which did not intervene in this litigation) and the Board of Elections (which has moved this Court to affirm the decision below). Thus, the Panel's decision in and of itself has not caused Appellants any "direct injury," because it "ha[s] not ordered [Appellants] to do or refrain from doing anything." *Hollingsworth*, 133 S. Ct. at 2662-64. Moreover, it is far from clear that whatever remedial map the Panel ultimately adopts will actually "impair" or otherwise injure whatever interests Appellants claim to have in the boundaries or composition of other congressional districts in the Commonwealth.

Indeed, Appellants themselves have submitted two proposed remedial plans for the Panel's consideration. Rather than sitting on the sidelines while the General Assembly redistricts as is ordinarily the case, Appellants have been given the rare opportunity to draw maps in the first instance, which may still be adopted by the Panel below. By Appellants' own description, seven of the current members of Congress among them would retain a majority of Republican voters in their district under these plans. Congressman Rigell, the only Appellant who, even under Appellants' own proposed plans, would see a drop in the Republican vote share in his district would lose "only 0.6%" of those voters. Intervenor-Defendants' Br. In Support of Their Proposed Remedial Plans 13, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 18, 2015), ECF No. 232. That Appellants have nonetheless argued, for purposes of their appeal, that their injury is "*certain*," Appellants' Opp. Br. at 11, underscores how radical Appellants' claim to standing truly is.

Third, Appellants have failed to establish that the injury that they claim, either as representatives of districts other than CD3, or "Republican voters," is a "*legally protected* interest" that can support Article III standing. *Lujan*, 504 U.S. at 560. Taken to its logical (and patently absurd) conclusion, Appellants' argument would confer upon members of Congress, former members of Congress, and voters in general *a legally cognizable interest* in maintaining the precise partisan composition of the voters in the districts that they represent or live in.

This Court has never recognized a legal right following from such a broad and diffuse injury, and for good reason. Under this theory, a member of Congress

would have Article III standing to challenge or defend virtually any law that causes even a miniscule number of voters who have in the past supported a member of Congress to move *from* that member's district—or, alternatively, causes voters that have supported the other party to move *into* that member's district—on the theory that it reduces their partisan vote share and is "likely" to cause them injury by threatening their seat (or, in the case of a "Republican voter," their partisan interest in a member of their own party holding that congressional seat). Thus, one could imagine a member of a party that enjoys disproportionate support among university communities filing suit to challenge the reduction of funding to a university in their district on the ground that the likely result would be that their partisan vote share in the district would be reduced. But this is the very definition of an attenuated harm, which in any other context would plainly not be direct enough or "fairly traceable" to the conduct at issue to support standing. And the harm that Appellants assert is even further afield—they are not the members that represent the district in which the funding for the university has been cut, they are the members of the party that does *not* enjoy disproportionate support among university communities, who represent the *surrounding* districts, and who would file suit (or attempt to defend an adverse judgment on appeal) based on their fear that the cut to the university's funding will displace voters that have supported their *opponents* from the district in which they currently reside into other districts in the state. That such a result would be indisputably absurd exposes the fatal flaws in Appellants' position.

If Appellants are not claiming a legally cognizable interest in maintaining precisely the same partisan balance in the districts that they represent, then their

standing must be based on an assumption that any change to the reapportionment plan is likely to actually harm their chances for reelection. But this alleged harm is also fundamentally flawed. *First*, it assumes that maintaining the same partisan balance—or even a majority partisan voter share—in a district that one represents or lives in is a legally cognizable injury; that this is so is far from clear. *Second*, it further assumes that the Panel will adopt a map that, in remediating the racial gerrymander in a district that none of Appellants represent or live in, will necessarily reduce the Republican electorate in one or more of Appellants' districts substantially enough that the reduction is likely to harm the current Representative's chances at reelection. *Third*, it assumes that the Appellants who are current members of Congress are not likely to lose an election provided that their districts remain as they are currently drawn. Cantor's own experience illustrates that this is not the case: politicians lose elections all of the time for all kinds of reasons.

Given the unpredictability of voters and the myriad of factors that might effect a politician's reelection chances, limiting standing in the gerrymandering context to politicians and voters that represent and reside in the districts that are subject to challenge enforces Article III's case and controversy requirements and guards against precisely what Appellants are attempting to do here—hijack litigation that the named Defendants no longer wish to defend and obtain Supreme Court review based entirely on harms that may never come to pass. Even if Appellants' worst fears were to come true, and one or more of their number lost a bid for reelection, an argument that their loss was the result of changes that were made to remediate a racial gerrymander in another district

would be tenuous at best. *See Lujan*, 504 U.S. at 560-61 (holding Article III requires "a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action . . . and not . . . the result of the independent action of some third party not before the court") (internal quotation marks and alterations omitted).

Fourth, Appellants' assertion that they have suffered a cognizable injury as "Republican voters" is indistinguishable from an argument that any voter in the Commonwealth has standing to challenge or defend CD3 as a racial gerrymander. Just as a Republican voter may argue that his interest in maintaining the partisan balance of his district in the face of potential changes to a district elsewhere in the Commonwealth confers standing, a Democratic voter might make the exact same argument about her own district. This is precisely the type of "generalized grievance against allegedly illegal governmental conduct" that the Court has found insufficient to meet Article III's standing requirements in *Hays* and elsewhere. 515 U.S. at 743. *See also id.* at 744 ("We . . . reject appellee's position that 'anybody in the State has a claim[.]'").

Finally, Appellants are likely to argue that, if the Court dismisses their appeal on standing grounds and the remedial map does in fact endanger their reelection chances, they will have been deprived of their opportunity to challenge a new map that resulted in their political injury. As noted above, it is not clear that this is a cognizable harm in any event, but even if it were, under such circumstances Appellants may theoretically then have standing to bring a challenge to the Panel's adopted remedial plan, *but only if they can make an argument that the remedy violates their*

constitutional or statutory legal rights in some way. That challenge has not yet arisen and is not before this Court. But by asking the Court to entertain their appeal now—an appeal that by Appellants' own admission is based entirely on harms that they are afraid they might suffer when the Panel adopts a map in the future—Appellants are attempting to litigate this future case without the benefit of either an applicable record or asserting any legally cognizable claims. The Court's precedent is clear: Appellants could not have brought this racial gerrymandering claim to begin with and the Court should not permit them to litigate their future fears, untethered from the present reality and without even a legal Complaint to ground them, in these proceedings.

CONCLUSION

Appellees respectfully submit that the appeal should be dismissed for lack of jurisdiction because Appellants lack standing to pursue it.

Respectfully submitted,

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October 13, 2015

No. 14-1504

In the Supreme Court of the United States

ROBERT J. WITTMAN, ET AL., APPELLANTS

v.

GLORIA PERSONHUBALLAH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTIONS PRESENTED

1. Whether appellants have standing to appeal the district court's judgment.

2. Whether the district court clearly erred or adopted an incorrect legal standard in concluding that the Virginia legislature predominantly relied on race in a manner that was not narrowly tailored when drawing District 3 in its 2012 congressional redistricting plan.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 8
Argument:
I. Appellants lack standing to appeal 11
II. The district court did not clearly err or adopt an incorrect legal standard in holding that the legislature violated equal protection in drawing District 3 19
A. The predominance test requires a careful, fact-intensive review of the record to determine the predominant factor motivating a district's lines 19
B. The district court's finding that race predominated is not clearly erroneous 22
C. Appellants are incorrect that race cannot predominate if race and politics are coextensive 28
D. The district court correctly concluded that Virginia's use of race was not narrowly tailored 32
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Alabama Legislative Black Caucus v. *Alabama*, 135 S. Ct. 1257 (2015) ..... *passim*
Allen v. *Wright*, 468 U.S. 737 (1984) 12
Amadeo v. *Zant*, 486 U.S. 214 (1988) 23
Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985) 22, 26
Arizona State Legislature v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) 17
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 12, 13

Cases—Continued: Page

Bartlett v. *Strickland*, 556 U.S. 1 (2009) 20
Bethune-Hill v. *Virginia State Bd. of Elections*, No. 3:14CV852, 2015 WL 6440332, (E.D. Va. Oct. 22, 2015), appeal pending, No. 15-680 (filed Nov. 20, 2015) 23
Bush v. *Vera*, 517 U.S. 952 (1996) 19, 21, 30, 32
Cantor v. *Personhuballah*, 135 S. Ct. 1699 (2015) 5
Clements v. *Fashing*, 457 U.S. 957 (1982) 16
Davis v. *FEC*, 554 U.S. 724 (2008) 16
DeWitt v. *Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), summarily aff'd in part and dismissed in part, 515 U.S. 1170 (1995) 20
Diamond v. *Charles*, 476 U.S. 54 (1986) 12, 13
Easley v. *Cromartie*, 532 U.S. 234 (2001) 22, 23, 27, 28 31
Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) 16
Glossip v. *Gross*, 135 S. Ct. 2726 (2015) 23
Hollingsworth v. *Perry*, 133 S. Ct. 2652 (2013) 11, 13, 17
Hunt v. *Cromartie*, 526 U.S. 541 (1999) 27, 28
Lance v. *Coffman*, 549 U.S. 437 (2007) 17
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 12
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 11
McConnell v. *FEC*, 540 U.S. 93 (2003), overruled in part on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010) 12, 14
Meese v. *Keene*, 481 U.S. 465 (1987) 15
Miller v. *Johnson*, 515 U.S. 900 (1995) ..... *passim*
Moore v. *U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984) 13
Page v. *Virginia State Bd. of Elections*, 58 F. Supp. 3d 533 (E.D. Va. 2014) 5
Powell v. *McCormack*, 395 U.S. 486 (1969) 14

Cases—Continued: Page

Raines v. *Byrd*, 521 U.S. 811 (1997) 12, 13, 14
Regents of Univ. of Cal. v. *Bakke*, 438 U.S. 265 (1978) 29
Shaw v. *Hunt*, 517 U.S. 899 (1996) 2, 19, 29, 30, 32
Shaw v. *Reno*, 509 U.S. 630 (1993) 2
Shelby County v. *Holder*, 133 S. Ct. 2612 (2013) 2
Sinkfield v. *Kelley*, 531 U.S. 28 (2000) 17, 18
Storer v. *Brown*, 415 U.S. 724 (1974) 16
Swann v. *Adams*, 385 U.S. 440 (1967) 18
United States v. *Hays*, 515 U.S. 737 (1995) 18
Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 15
Voinovich v. *Quilter*, 507 U.S. 146 (1993) 21
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 11

Constitution, statutes and regulations:

U.S. Const.:
Art. III 9, 11, 13
§ 2 11
Art. VI, Cl. 2 (Supremacy Clause) 21
Amend. I 15
Amend. XIV (Equal Protection Clause) 2
Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (52 U.S.C. 10301 *et seq.*) 1, 5, 11, 21, 32, 33
§ 2, 79 Stat. 437 20
§ 4(b), 79 Stat. 437 2
§ 5, 79 Stat. 439 2
52 U.S.C. 10304(a) 2
52 U.S.C. 10304(b) 2
28 U.S.C. 1253 5
28 C.F.R. 51.49 34

Miscellaneous: Page

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. (Feb. 9, 2011):

p. 7470 3
p. 7471 ..... 3, 33
p. 7472 20

In the Supreme Court of the United States

No. 14-1504

ROBERT J. WITTMAN, ET AL., APPELLANTS

v.

GLORIA PERSONHUBALLAH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE UNITED STATES

This case involves the constitutionality of a redistricting plan that was purportedly designed, in part, to comply with the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* The United States, through the Attorney General, has primary responsibility for enforcing the VRA. Accordingly, the United States has a substantial interest in the proper interpretation of the VRA and the related constitutional protection against racial discrimination. Because the United States litigates jurisdictional issues in suits against official defendants, it also has an interest in the standing question in this case.

STATEMENT

1. When drawing legislative districts, States must balance a complex array of factors while adhering to constitutional and statutory requirements. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 915-916 (1995). As

relevant here, the Equal Protection Clause forbids an unjustified predominant reliance on race in redistricting. See *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). Given the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution" before concluding that district lines were drawn based on race. *Miller*, 515 U.S. at 916. If race is the "predominant factor" in drawing a district, however, that use of race must be "narrowly tailored to serve a compelling state interest." *Shaw* v. *Hunt*, 517 U.S. 899, 902, 905 (1996) (*Shaw II*) (internal quotation marks omitted).

At the time of the redistricting measures at issue here, Section 5 of the VRA required covered jurisdictions, including Virginia, to establish that districting changes had neither the purpose nor the effect of discriminating based on race. 52 U.S.C. 10304(a).[1] To obtain preclearance, Virginia was required to demonstrate, *inter alia*, that the map would not result in retrogression by diminishing a minority group's ability "to elect [its] preferred candidates." 52 U.S.C. 10304(b). To determine whether a redistricting plan was retrogressive, the new voting plan was compared against the existing, or "benchmark," plan, using updated census data in each and conducting a functional analysis focused on whether the proposed plan maintained a minority group's ability to elect. *Guidance Concerning Redistricting Under Section 5 of the*

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[1] In *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), this Court held that the coverage formula in Section 4(b) of the VRA could no longer be used to require preclearance under Section 5. *Id.* at 2631. Thus, Virginia is not currently subject to Section 5.

Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (*2011 Guidance*).

2. a. Following the 2010 census, Virginia needed to redraw its congressional and state legislative districts to balance population disparities. J.S. App. 7a. Among the malapportioned districts was Congressional District 3, the only district in which minority voters had the ability to elect their preferred candidates. *Id.* at 7a, 28a. To repopulate District 3, which needed an additional 63,976 people, the 2012 congressional plan (2012 Plan) shuffled more than 180,000 individuals between districts. *Id.* at 30a. Specifically, the plan moved nearly 59,000 people—who were predominantly white—out of District 3, and brought over 120,000 people—who were predominantly black—into the district. *Ibid.* Those changes increased District 3's black voting-age population (BVAP) from 53.1% to 56.3%. *Id.* at 9a.

The 2012 Plan was authored by state legislator Bill Janis. J.S. App. 8a, 47a. In legislative hearings, Janis stated that he had followed several criteria in creating the plan, including equalizing population, complying with the VRA, preserving district cores, keeping localities and other jurisdictions together, and respecting communities of interest. J.A. 351-353.

According to Janis, "the primary focus of how the lines in [the 2012 Plan] were drawn was to ensure that there be no retrogression" in District 3. J.A. 370; see, *e.g.*, *ibid.* (characterizing nonretrogression as "one of the paramount concerns and considerations that was not permissive and nonnegotiable"). Janis acknowledged that he had not considered voting patterns to determine how demographic changes in District 3 affected minority voters' ability to elect their

preferred candidates. J.A. 359-360. Instead, Janis understood nonretrogression to require that the new map preserve the BVAP percentage in District 3 without reduction. See J.A. 119, 357. Janis further drew District 3 to increase the BVAP beyond 55%, which the legislature had adopted as a floor for majority-minority districts in the state legislative map. J.S. App. 20a; J.A. 106-107, 518, 527. When Janis was asked whether there was "any empirical evidence whatsoever that 55 percent [BVAP] is different than 51 percent," or whether a 55% floor was "just a number that has been pulled out of the air," he stated that a district with a 55% BVAP, in contrast to one with a 51% BVAP, was certain to obtain preclearance. J.A. 397-398; see J.S. App. 21a.

Janis stated that the 2012 Plan was also "drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections," achieved "by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together." J.A. 352. Janis claimed he had consulted with Virginia's incumbent congressmen, "both Republican and Democrat, in a bipartisan manner." J.A. 372. But he clarified that he sought input only on each Member's specific district, and had not solicited recommendations regarding the plan as a whole. J.A. 374, 456. And Janis expressly disavowed having "any knowledge as to how the plan improves the partisan performance of those incumbents in their own district[s]." J.A. 456. Janis stated that he "ha[d]n't looked at the partisan performance" and that "[i]t was not one of the factors that [he] considered in the drawing of the district[s]." *Ibid.*

After the legislature adopted the 2012 Plan, Virginia sought preclearance under Section 5 of the VRA. J.S. App. 10a. The Attorney General precleared the plan in March 2012. *Ibid.*

3. a. Appellees are registered voters residing in District 3. J.S. App. 10a & n.9. They filed this suit alleging that District 3 was racially gerrymandered in violation of equal protection. *Id.* at 10a. Appellants are current and former Members of Congress from other districts in Virginia who intervened as defendants in support of the 2012 Plan. *Id.* at 3a-4a, 11a.[2]

b. Following a bench trial, a three-judge district court invalidated District 3, holding that it was drawn predominantly based on race in a manner not narrowly tailored to achieve VRA compliance. *Page* v. *Virginia State Bd. of Elections*, 58 F. Supp. 3d 533, 548-551 (E.D. Va. 2014). Appellants, but not Virginia, appealed pursuant to 28 U.S.C. 1253. J.S. App. 4a & n.7, 11a-12a & n.10. This Court vacated the district court's judgment and remanded for further consideration in light of *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257 (2015) (*Alabama*). See *Cantor* v. *Personhuballah*, 135 S. Ct. 1699 (2015).

c. On remand, the district court again concluded that race predominated in drawing District 3 and that the use of race was not narrowly tailored to comply with the VRA. J.S. App. 1a-44a.

The district court found that race predominated based on "direct evidence of legislative intent, including statements by the legislation's sole sponsor," in combination with circumstantial evidence that "tradi-

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[2] The district court did not specify whether the intervention was permissive or as of right. See 13-cv-678 Docket entry No. (Docket No.) 26 (Dec. 3, 2013); Docket No. 165 (May 11, 2015).

tional districting criteria were subordinated to race." J.S. App. 16a, 30a (brackets and citation omitted). With respect to direct evidence, the court cited Janis's statements that "his 'primary focus'" was "ensuring that [District 3] maintained at least as large a [BVAP percentage] as had been present in the district under the Benchmark Plan." *Id.* at 22a. The court further found that voters were placed within District 3 to satisfy a 55% BVAP floor, which was "not informed by an analysis of voter patterns," but which the legislature nevertheless viewed as an appropriate means of obtaining preclearance. *Id.* at 20a-21a. That use of race as "the single 'nonnegotiable' redistricting criterion," the court explained, supported a finding that race had predominated. *Id.* at 21a.

The district court concluded that circumstantial evidence provided "further support" for that finding. J.S. App. 23a-24a. The court noted that District 3 is "the least compact congressional district in Virginia" and has an "odd shape" that strategically uses water contiguity to "bypass white communities" and connect "a disparate chain" of "predominantly African-American populations." *Id.* at 25a-26a. Moreover, District 3 splits more local political boundaries and voting districts (VTDs) than any other congressional district in Virginia, with those splits serving to exclude white populations and bring black populations into the district. *Id.* at 27a. And the splits could not be explained as an effort to preserve district cores, the court observed, because the legislature had "moved over 180,000 people in and out of the districts surrounding [District 3] to achieve an overall population increase of only 63,976." *Id.* at 30a. "Tellingly," the court noted, "the populations moved out of [Dis-

trict 3] were predominantly white, while the populations moved into the District were predominantly African-American." *Ibid.*

The district court rejected the argument that political considerations drove District 3's design. J.S. App. 30a-36a. The court found no direct evidence that politics predominated; to the contrary, Janis had disclaimed reliance on "partisan performance," stating that "[i]t was not one of the factors that [he] considered in the drawing of the district." *Id.* at 34a. Moreover, the circumstantial evidence was more consistent with a finding of racial predominance because "[a]mong the pool of available VTDs that could have been placed within [District 3] that were highly Democratic performing, those with a higher BVAP were placed within [District 3], and those VTDs that were largely white and Democratic were left out." *Ibid.* (internal quotation marks omitted).

Having concluded that race predominated, the district court applied strict scrutiny and held that, although the legislature's effort to comply with the VRA constituted a "compelling state interest," the 2012 Plan was not "narrowly tailored to further that interest." J.S. App. 37a. The court observed that the legislature had "relied heavily on a mechanically numerical view as to what counts as forbidden retrogression" by adopting a 55% BVAP floor in District 3 and then using that threshold to "increas[e] the BVAP of a safe majority-minority district." *Id.* at 39a-42a. The court concluded that the legislature lacked a strong basis in evidence for believing that the VRA required augmentation of District 3's BVAP using the unsupported 55% racial target. *Id.* at 41a.

Judge Payne dissented. J.S. App. 45a-93a. He acknowledged that the majority had "applied the proper analytic framework as specified by *Alabama*," but he disagreed with the majority's view of the record. *Id.* at 45a. Judge Payne identified several errors he perceived in the majority's factfinding, including its determination that the legislature adopted a 55% BVAP floor in District 3 and its finding that appellees' expert witness was more credible than Virginia's expert. *Id.* at 66a-67a, 70a, 72a, 83a-85a; see *id.* at 21a n.16. Judge Payne would have found that "the redistricting decision here was driven by a desire to protect incumbents and by the application of traditional redistricting precepts." *Id.* at 46a. Thus, although he acknowledged that "race was considered," he did not believe race predominated. *Id.* at 46a-47a.

d. Shortly after the district court issued its opinion, and before any remedial plan was proposed or implemented, appellants filed this appeal. J.S. App. 103a-104a. Virginia declined to appeal.

4. The Virginia legislature subsequently convened to draw a new congressional map, but adjourned without enacting a plan. Appellants' Br. 12-13. The district court accordingly appointed a Special Master to help develop a remedial plan. 13-cv-678 Docket entry No. (Docket No.) 241, at 1 (Sept. 25, 2015). On January 7, 2016, the court ordered Virginia to implement one of the plans recommended by the Special Master. Docket No. 300.

SUMMARY OF ARGUMENT

I. Appellants, current and former Members of Congress in districts outside District 3 who intervened below, lack standing to bring this appeal. Because Virginia acquiesced in the district court's deci-

sion invalidating District 3, appellants must independently establish Article III standing to defend the constitutionality of the legislature's redistricting plan. Appellants cannot satisfy Article III's injury-in-fact requirement, however, because they cannot show that the court's decision affects any interest of theirs that is legally protected and judicially cognizable.

Appellants maintain (Br. 58) that they are harmed because a remedial redistricting plan will move "unfavorable Democratic voters" into the districts they represent, thereby decreasing their chances of reelection. But appellants have no legally protected interest in excluding voters from their districts on the basis of political affiliation. Appellants' desire to fence out those voters to enhance their odds of electoral success does not amount to a judicially cognizable harm. Nor does any decision from this Court support appellants' novel claim of injury. This Court should dismiss for lack of jurisdiction and reaffirm that voters in our democratic system choose their representatives—not the other way around.

II. If the Court reaches the merits, it should affirm the district court's judgment that Virginia predominantly relied on race in a manner that was not narrowly tailored when drawing District 3.

A. Although some of the district court's language was imprecise, the court applied the correct legal standard for racial predominance. Because mere consciousness of race in redistricting does not trigger strict scrutiny, statements acknowledging a legislature's obligation to comply with the VRA do not show that race predominated. The Court should reaffirm that point here. But the district court's opinion is not fairly read as concluding that race predominated

based on statements regarding the mandatory nature of VRA compliance. Rather, the court relied on the legislature's erroneous method of VRA compliance—namely, adoption of unsupported and mechanical racial targets for District 3. Because the court concluded that those targets were the principal factor determining which voters were placed in District 3, it did not commit legal error in finding racial predominance.

B. Nor is there any clear factual error in the district court's predominance finding. Direct evidence showed that the legislature erroneously believed that the VRA prohibited any reduction of District 3's BVAP and that the legislature adopted a 55% BVAP floor for the district, uninformed by any analysis of voter patterns. The plan's drafter stated that his primary focus in drawing the district was VRA compliance, achieved by using those unsupported racial targets. And circumstantial evidence of the district's shape and demographics further supported a finding of racial predominance. Direct and circumstantial evidence also supported the court's finding that District 3's boundaries were better explained by race than politics. Appellants identify no clear error in the court's evaluation of the evidence.

C. Because race predominated, strict scrutiny applies even if appellants are correct (Br. 26) that racial and political goals coincided and could theoretically have prompted the legislature to draw the same lines without relying on race. A racial gerrymandering claim does not depend on a showing that race and politics conflicted. The constitutional harm flows from the predominant use of race, and a plaintiff who makes that showing need not further establish that a

district's configuration necessarily differed from what it would have been in the absence of the impermissible racial motive.

D. The district court did not err in concluding that Virginia's predominant use of race in drawing District 3 was not narrowly tailored to the compelling state interest of complying with the VRA. Section 5 does not require jurisdictions to adhere to mechanical and factually unsupported racial targets, uninformed by a functional analysis of a minority group's ability to elect. Because Virginia lacked a strong basis in evidence to believe that it needed to increase District 3's BVAP using the 55% floor adopted by the legislature, its predominant use of race violated equal protection.

ARGUMENT

I. APPELLANTS LACK STANDING TO APPEAL

1. Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." U.S. Const. Art. III, § 2. Standing to sue or defend is an "essential aspect" of the case-or-controversy requirement. *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013). To have standing, the party invoking the federal court's jurisdiction must establish injury-in-fact, causation, and redressability. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (*Defenders*). The application of those requirements "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

To satisfy Article III's injury-in-fact requirement, a litigant must show "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Defenders*, 504 U.S. at 560 (internal quotation marks omitted). Not every per-

ceived grievance qualifies; rather, "the alleged injury must be legally and judicially cognizable." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997). The Court has concluded, for example, that a parent has no legally protected interest in enforcement of a criminal statute requiring the payment of child support, because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). And candidates and voters have no judicially cognizable interest in preventing increases in campaign-contribution limits on the ground that it will create inequality for those with fewer resources because that "claim of injury" is "not to a legally cognizable right." *McConnell* v. *FEC*, 540 U.S. 93, 227 (2003), overruled in part on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010). Some claimed injuries, the Court has explained, are simply "not appropriate[] to be considered judicially cognizable." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984).

The requirement to show a judicially cognizable injury "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) (*Arizonans*). A State whose law is invalidated "has standing to defend the constitutionality of [the] statute" on appeal because it has "a direct stake * * * in defending the standards embodied in" state law. *Diamond* v. *Charles*, 476 U.S. 54, 62, 65 (1986) (citation and internal quotation marks omitted). But if the State declines to appeal, there is no longer a case or controversy between it and the prevailing party. *Id.* at 64. In that circumstance, an intervenor may seek to "keep

the case alive" by pursuing an appeal, *id.* at 68, but the "intervenor cannot step into the shoes of the original party unless [he] independently" establishes Article III standing. *Arizonans*, 520 U.S. at 65. In short, the "decision to seek review" is "not to be placed in the hands of concerned bystanders," but rather must be confined to those whose legally protected and judicially cognizable interests are affected by the judgment. *Diamond*, 476 U.S. at 62 (internal quotation marks omitted).

2. Because Virginia declined to appeal the district court's decision finding that District 3 violates equal protection, appellants, who are current and former Members of Congress in districts surrounding District 3, may maintain this suit only if they independently have Article III standing. Appellants contend (Br. 58) that they are harmed by the judgment because any remedial redistricting plan will "replace a portion of the[ir] 'base electorate' with unfavorable Democratic voters" and thereby decrease their chances of reelection.[3] That argument is unavailing.

a. Appellants have no judicially cognizable interest in excluding voters they perceive to be undesirable from their districts. An incumbent holds office "as trustee for his constituents, not as a prerogative of personal power." *Raines*, 521 U.S. at 821; see *Moore*

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[3] Appellants also briefly suggest (Br. 58) that they have a cognizable injury because the remedial order will "undo [their] recommendations for [their] district[s]." To the extent appellants provided such input, but see p. 27, *infra*, they have no legal entitlement to the implementation of those recommendations. Cf. *Hollingsworth*, 133 S. Ct. at 2662-2663 (holding that proponents of ballot initiative lacked standing to defend it because they had no role in its enforcement once it was enacted into law).

v. *U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) ("[N]o officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest," "[w]hatever the realities of private ambition and vainglory may be."). Elected officials who contemplate running for reelection therefore have no legally protected entitlement to a district with a particular political composition. As far as the *law* recognizes, voters choose their representatives—not the other way around.[4]

Nor can appellants establish a judicially cognizable interest by characterizing their injury at a high level of generality as a harm to their electoral chances. Not all perceived injuries that implicate the "ability to participate in the election process" qualify as "legally protected interest[s]." *McConnell*, 540 U.S. at 227. In *McConnell*, for example, the Court rejected the argument that voters and candidates had a cognizable interest in challenging campaign-contribution-limit increases that allegedly "deprive[d] them of an equal ability to participate in the election process based on their economic status" because that kind of "broad and diffuse injury" had "never [been] recognized [as] a legal right." *Ibid.* A candidate's claim that his elec-

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[4] This Court has recognized that elected officials have standing to defend "something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents ha[ve] elected *them*," *Raines*, 521 U.S. at 821, or back pay, *Powell* v. *McCormack*, 395 U.S. 486, 499-500 (1969). But those interests are distinct from—and provide no support for—the argument that incumbents contemplating a future term have a legally protected interest in adding favorable voters to their districts or fending off unfavorable ones.

toral chances will be harmed cannot be assessed without further considering the particular acts alleged to create that injury. When the grievance is simply the impact of having more "overwhelmingly Democratic" voters placed within the candidate's district (Appellants' Br. 57), he has not suffered an invasion of a legally protected interest.[5]

b. No case supports appellants' argument that candidates have a legally protected interest in excluding individuals from their district on the basis of political affiliation. In *Meese* v. *Keene*, 481 U.S. 465 (1987), a state senator alleged that a law classifying films he wished to exhibit as "political propaganda" caused him reputational harm that could impair his political career. *Id.* at 467. The Court held that he had standing to raise a First Amendment claim because the statute created a cognizable reputational injury that could be redressed by enjoining application of the "political propaganda" label. *Id.* at 475-477. There was no question that the reputational harm at issue in *Keene* was judicially cognizable; indeed, the government (as defendant) had conceded the point. See Appellants' Br. at 14, *Keene*, *supra* (No. 85-1180). Like any other citizen, Keene could assert standing based on injury to his professional reputation, and the fact that he was a

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[5] Notably, Members of the Court have suggested that a severe partisan gerrymander imposes injury on those subject to the political classification. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 312 (Kennedy, J., concurring in the judgment); *id.* at 331 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 367 (Breyer, J., dissenting). It would be anomalous to find that a *candidate* suffers a judicially cognizable injury when he is unable to fence voters out of his district on the basis of political classifications and thus is deprived of the opportunity to impose the very injury that *Vieth* deemed troubling.

legislator did not change that result. But *Keene* cannot be read to more broadly establish that all alleged injuries in the context of a reelection campaign—including those that have nothing to do with reputation—are legally protected.

Appellants' other cases likewise fail to support their theory of standing. The candidate in *Davis* v. *FEC*, 554 U.S. 724 (2008), had standing to challenge a campaign-finance law because the Federal Election Commission could pursue an enforcement action against him if he violated it; the candidate's injury arose from regulation of his speech and the threat of punishment, not from any cognizable interest in the political affiliation of his electorate. See *id.* at 733-735. Similarly, the Court's ballot-access and employment-discrimination cases recognize a legally protected interest in having an equal opportunity to compete in an election or a hiring process, but they nowhere suggest that a candidate's desire to exclude disfavored voters from his district is judicially cognizable. *E.g.*, *Clements* v. *Fashing*, 457 U.S. 957, 962 (1982); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 764-766 (1976); *Storer* v. *Brown*, 415 U.S. 724, 730, 738 n.9 (1974).

Nor are appellants helped by the suggestion (Br. 57) that they have each suffered injury to their "interests as a Republican voter." Appellants cite no case for the extraordinary proposition that voters have a legally protected and judicially cognizable interest in the particular political composition of their districts. And for good reason. Because any alteration of one district necessarily affects surrounding districts, appellants' theory of standing would permit virtually anyone in the State to assert injury and so defend against a racial gerrymandering claim. That is the

very definition of "a 'generalized grievance,'" which "is insufficient to confer standing." *Hollingsworth*, 133 S. Ct. at 2662; see *Lance* v. *Coffman*, 549 U.S. 437, 439-442 (2007) (per curiam). In short, appellants' novel claim of injury has never been recognized as a basis for standing.

c. Two additional aspects of the redistricting context counsel against permitting appellants' purported injury to satisfy standing requirements. First, standing to defend should be particularly difficult to establish when the State itself has acquiesced in a judgment regarding its redistricting plan. Cf. *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (explaining that standing helps determine the "proper party" to assert claims). As this Court recently observed, the Court has "never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to." *Hollingsworth*, 133 S. Ct. at 2668. Given that redistricting is a quintessential state sovereign function, appellants' purported right to defend a redistricting plan that the State no longer defends warrants skeptical examination to "ensure[] that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society." *Id.* at 2667 (internal quotation marks omitted).

Second, the result of appellants' standing analysis—that individuals in other districts throughout the State could defend against a racial gerrymandering claim—is in significant tension with this Court's holding that generally only individuals within the challenged district have standing to bring a racial gerrymandering claim. See *Sinkfield* v. *Kelley*, 531

U.S. 28, 30-31 (2000) (per curiam); *United States* v. *Hays*, 515 U.S. 737, 739 (1995). It does not matter that the shape of surrounding districts are "necessarily influenced by the shape[] of the" challenged district. *Sinkfield*, 531 U.S. at 30. Nor does it matter that "the racial composition of [surrounding] district[s] might have been different had the legislature drawn the [challenged] district another way." *Id.* at 30-31. Those kinds of inevitable ripple effects do not provide individuals in neighboring districts with "a cognizable injury under the Fourteenth Amendment." *Hays*, 515 U.S. at 746.[6] Given that a plaintiff—whether as candidate or voter—has no legally protected interest in the composition of his district sufficient to *challenge* a different district as a racial gerrymander, it would be incongruous to nevertheless recognize such an injury to *defend* a different district against constitutional attack.

The Court should dismiss for lack of jurisdiction because appellants have no legally protected entitlement to a district of a particular partisan composition.

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[6] In *Swann* v. *Adams*, 385 U.S. 440, 443 (1967), this Court permitted voters to bring a population-equality challenge to a redistricting plan even though they resided in a district that was not significantly malapportioned. The Court emphasized, however, that the district court had "denied intervention to other plaintiffs, seemingly treating the appellants as representing other citizens in the State." *Ibid.* The standing analysis in *Swann* is properly confined to that unusual circumstance.

II. THE DISTRICT COURT DID NOT CLEARLY ERR OR ADOPT AN INCORRECT LEGAL STANDARD IN HOLDING THAT THE LEGISLATURE VIOLATED EQUAL PROTECTION IN DRAWING DISTRICT 3

If the Court concludes that appellants have standing, it should affirm the district court's judgment. The court did not clearly err in finding that District 3 was drawn predominantly based on race in a manner not narrowly tailored to achieve VRA compliance.

A. The Predominance Test Requires A Careful, Fact-Intensive Review Of The Record To Determine The Predominant Factor Motivating A District's Lines

1. When a district is challenged as a racial gerrymander, strict scrutiny applies if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district. *Alabama*, 135 S. Ct. at 1267 (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995)). To make that showing, a plaintiff may rely on "direct evidence going to legislative purpose" or "circumstantial evidence of a district's shape and demographics," which may demonstrate that race-neutral districting principles, such as compactness, contiguity, and respect for political subdivisions and communities of interest, were thoroughly subordinated to racial considerations. *Miller*, 515 U.S. at 916.

A legislature's mere "consciousness of race" does not trigger strict scrutiny, *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality opinion); rather, "[t]he constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." *Shaw II*, 517 U.S. at 905 (quoting *Miller*, 515 U.S. at 913). Because the "distinction between being aware of racial considerations and being motivated by them may be difficult to

make," the predominance inquiry requires a fact-intensive analysis of the record that carefully evaluates evidence of motive. *Miller*, 515 U.S. at 916. Courts conducting that analysis must presume that the legislature acted in good faith and must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Ibid.*

The predominance inquiry is appropriately demanding because redistricting decisions implicate a "complex interplay of forces," *Miller*, 515 U.S. at 915-916, including the need to reconcile traditional districting criteria with constitutional and statutory requirements. Compliance with the VRA in particular will inevitably involve considerations of race—but the VRA does not require jurisdictions to focus predominantly on race or to disregard or subjugate traditional redistricting principles when drawing district lines.[7] Because "[t]he law cannot lay a trap for an unwary legislature," *Alabama*, 135 S. Ct. at 1273-1274, a redistricting plan is not subject to strict scrutiny simply because a jurisdiction correctly understood it was required to comply with the VRA. If districting decisions are driven by non-racial criteria, then the mere fact that the jurisdiction sought to comply with the VRA will not show that race predominated. See, *e.g.*, *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1411, 1415 (E.D.

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[7] Indeed, some traditional redistricting principles are embedded in the VRA's standards. For example, "the geographic compactness of a jurisdiction's minority population" is a factor in retrogression analysis. *2011 Guidance* 7472. Similarly, Section 2 requires plaintiffs to establish that it is possible to draw a geographically compact majority-minority district. *Bartlett* v. *Strickland*, 556 U.S. 1, 12 (2009).

Cal. 1994), summarily aff'd in part and dismissed in part, 515 U.S. 1170 (1995).

2. Appellants contend (Br. 28-32) that the district court erred by basing its finding that race predominated on statements indicating that the legislature prioritized VRA compliance when drawing District 3. Appellants are correct that statements acknowledging the non-negotiable nature of VRA compliance do not show that race was the predominant consideration driving particular district boundaries. Under the Supremacy Clause, a State is obligated to prioritize VRA compliance over any inconsistent state-law redistricting criterion. See *Vera*, 517 U.S. at 991-992 (O'Connor, J., concurring). Thus, a legislator's statement recognizing the VRA as a binding requirement simply demonstrates "obedience to the Supremacy Clause," *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993), not a predominant racial motive.

Appellants misread the district court's decision, however, by interpreting its predominance finding to rest on statements regarding the mandatory nature of VRA compliance. Although the court's opinion contains some language that, in isolation, could be interpreted to suggest (erroneously) that race predominates whenever a legislature prioritizes VRA compliance, see, *e.g.*, J.S. App. 21a-23a, it is evident from the decision as a whole that the court did not make that error. The court focused not merely on the legislature's general goal of complying with the VRA, but rather on the specific means employed to achieve that goal—namely, the legislature's effort to "maintain[] at least as large a [BVAP percentage] as had been present in the district under the Benchmark Plan," and its "use of a 55% BVAP floor" in District 3 that "was

not informed by an analysis of voter patterns." *Id.* at 21a-22a. Statements showing that the legislature treated nonretrogression as the "primary focus" and "paramount concern[]" in drawing District 3 took on significance because the legislature had interpreted Section 5 to require adherence to unsupported and mechanical racial targets. *Id.* at 22a (emphasis omitted). Those statements accordingly supported the court's conclusion that the legislature relied on those targets as a principal factor determining which voters were assigned to District 3.

Given the district court's imprecise language, litigants and lower courts would benefit from a reminder that statements identifying VRA compliance as a priority in redistricting are not, on their own, evidence that race predominated. But because the court did not premise its predominance finding on such statements standing alone, and instead considered them in conjunction with evidence that a rigid racial goal actually drove District 3's boundaries, no legal error affected the court's predominance analysis.

B. The District Court's Finding That Race Predominated Is Not Clearly Erroneous

While the split decision below confirms that the record is subject to different interpretations, the district court did not clearly err in finding that race predominated in drawing District 3. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). A lower court's factual findings may not be reversed as clearly erroneous simply because the reviewing court "would have decided the case differently." *Easley* v. *Cromartie*, 532 U.S. 234,

242 (2001) (*Cromartie II*) (citation omitted); see *Glossip* v. *Gross*, 135 S. Ct. 2726, 2739 (2015); *Amadeo* v. *Zant*, 486 U.S. 214, 223 (1988). Instead, a reviewing court may find clear error only if it is "left with the definite and firm conviction that a mistake has been committed" based "on the entire evidence." *Cromartie II*, 532 U.S. at 242 (citation omitted). That standard is not satisfied here.

The direct and circumstantial evidence fairly supports the district court's finding that race predominated in drawing District 3. First, as described above, the legislature adopted a mechanical racial target for the district, viewing a 55% BVAP floor, uninformed by any analysis of voter patterns, as an appropriate means of obtaining preclearance. J.S. App. 20a-21a.[8] Second, Janis—who was the plan's sole drafter—

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[8] Appellants dispute that factual finding (Br. 43-44), but show no clear error in the district court's analysis. As the court observed, the legislature employed an identical 55% BVAP floor in the state legislative plan, and legislators referred to that racial target in contemporaneous debates concerning the congressional plan. See J.S. App. 20a-21a; J.A. 397-398, 527, 533; *Bethune-Hill* v. *Virginia State Bd. of Elections*, No. 3:14CV852, 2015 WL 6440332, at *9 (E.D. Va. Oct. 22, 2015), appeal pending, No. 15-680 (filed Nov. 20, 2015) (finding that the Virginia legislature used a 55% BVAP floor in the state plan); see J.A. 398 (statement by Janis that drawing District 3 with a BVAP exceeding 55% was "certain[]" to obtain preclearance, whereas creating a different majority-minority district with a 51% BVAP was "uncertain" to "pass[] [VRA] requirements"). Reviewing all the relevant legislative history, the court reasonably inferred that the legislature applied the same 55% BVAP threshold in both plans. J.S. App. 20a-21a. Indeed, Virginia's expert drew the same inference. See *id.* at 20a; J.A. 518 (stating that the legislature viewed the 55% BVAP floor as "appropriate to obtain Section 5 preclearance" and "acted in accordance with that view for the congressional districts").

erroneously believed that nonretrogression principles required him to maintain the BVAP percentage in District 3 without reduction. *Id.* at 22a.[9] Third, Janis stated that the primary factor motivating District 3's boundaries was VRA compliance, which he implemented through the use of those racial targets. *Id.* at 21a-23a. The legislature's belief that District 3's BVAP could not dip below the benchmark district's 53.1%, and in fact needed to be augmented to satisfy the 55% BVAP floor, supports the court's finding that the legislature prioritized race in determining which individuals to bring within the district. See *Alabama*, 135 S. Ct. at 1267 (observing that a legislature's "policy of prioritizing mechanical racial targets above all other districting criteria," along with evidence of how the legislature applied that goal in drawing a particular district, provided strong support "that race motivated the drawing of" the district's lines).

Circumstantial evidence of District 3's shape and demographics further support the district court's finding that race predominated. First, District 3 is "the least compact congressional district in Virginia" and its "odd shape" reflects a "disparate chain of communities, predominantly African-American, loose-

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[9] Appellants incorrectly claim (Br. 44-45) that Janis acknowledged only the "Section 5 truism" that there could be no retrogression in District 3, and that he "never said" that he had to maintain District 3's BVAP without reduction. In fact, Janis said that one of his "paramount concerns" was "ensur[ing] that" District 3 "would not retrogress in the sense that [it] would not have less percentage of [BVAP] * * * than exist[s] under the current lines." J.A. 357. Janis also said that, "mindful that the [VRA] requires us not to retrogress that district, what these lines reflect is under the new proposed lines, we can have no less [BVAP] than percentages that we have under the existing lines." J.A. 119-120.

ly connected by the James River." J.S. App. 25a. Second, the district is contiguous only through the use of water, with boundaries drawn along the river to "bypass white communities and connect predominantly African-American populations." *Id.* at 26a. Third, the district splits more localities and VTDs "than any other district in Virginia," and the evidence showed that such splits "would not have been necessary if the legislature was not trying to bypass white communities." *Id.* at 27a (brackets and internal quotation marks omitted). Fourth, the district departs from principles of core preservation because the legislature moved nearly 59,000 "predominantly white" individuals *out* of the district—which was already underpopulated—in order to bring over 120,000 "predominantly African-American" individuals in. *Id.* at 30a.

Although that type of circumstantial evidence could be consistent with a political motivation depending on the facts of the case, the record here fairly supports the district court's finding that District 3's boundaries were better explained by race than partisanship. J.S. App. 30a-36a. The court could not infer that the legislature moved African-Americans into District 3 because of their political affiliation or their reliability in voting for a particular party, rather than based on race, because Janis stated that he had not "looked at the partisan performance" and "[i]t was not one of the factors that [he] considered in the drawing of the district." *Id.* at 34a. Nor could incumbent congressmen supply Janis's missing political motive: it was "undisputed" that they did not provide input on "the entire 2012 Plan," but rather simply confirmed that they were satisfied with the "proposed changes to the lines of their individual districts." *Id.* at 33a-34a. And

the court found Janis's statement about respecting the will of the Virginia electorate to be "ambiguous" and in any event subordinate to the use of mechanical racial targets. *Id.* at 33a. Finally, the court credited appellees' expert's testimony that "the nature of the population swaps and shifts used to create [District 3] suggests that less was done to further the goal of incumbency protection than to increase the proportion of minorities within the district." *Id.* at 34a. "[A]mong the pool of available VTDs that could have been placed within [District 3] that were highly Democratic performing," the court observed, "those with a higher BVAP were placed within [District 3], and those VTDs that were largely white and Democratic were left out." *Ibid.* (first set of brackets in original).

Appellants identify no clear error in the district court's conclusion that the circumstantial evidence was more consistent with a racial motive. They contend (Br. 46-49) that the court should have credited Virginia's expert when analyzing the racial and political consequences of the VTD swaps between District 3 and adjacent districts. But the court acted within its discretion in finding appellees' expert more credible. J.S. App. 34a & n.25; see *Bessemer City*, 470 U.S. at 575 (findings based on credibility determinations "demand[] even greater deference"). And in arguing that "politics explains District 3," appellants place undue weight on evidence concerning incumbent protection. Appellants' Br. 35-36 (capitalization altered). They contend (Br. 35) that Janis sought to "perpetuat[e]" the results from the November 2010 election, in which eight Republicans and three Democrats prevailed, but Janis stated that his method of protecting incumbents was simply to not "cut[] out currently

elected congressmen from their current districts nor draw[] current congressmen into districts together." J.A. 352. Moreover, Janis's statement that he did not consider partisan performance cuts sharply against appellants' claim that he strategically packed Democrats into District 3 to reduce the Democratic vote share in surrounding districts. Appellants are also wrong to maintain (Br. 39) that incumbents "effectively drew their own districts." Three of the four incumbents in districts immediately surrounding District 3—all appellants here—either did not identify Janis as someone with whom they had communicated regarding redistricting or indicated that they did not provide any feedback on the plan. See, *e.g.*, J.A. 304, 333, 339. Indeed, appellants describe themselves (Br. 46 n.4) as "strangers to the redistricting process." Moreover, Janis clarified that incumbents had not provided direction on the plan as a whole, J.A. 456—suggesting that, contrary to appellants' theory, incumbents could not have engineered partisan-driven population swaps across multiple districts. Appellants accordingly have not established that the court clearly erred in its predominance finding.

Appellants' effort to analogize this case to *Cromartie II* also fails. In *Cromartie II*, the direct evidence of a racial motive was quite weak; a legislator and a legislative aide had referred to race when discussing the plan, but there was no direct evidence suggesting that racial considerations predominated. See 532 U.S. at 252-254; see also *Hunt* v. *Cromartie*, 526 U.S. 541, 547 (1999) (*Cromartie I*) (observing that at the summary judgment stage the plaintiffs had not even relied on direct evidence, but rather "offered only circumstantial evidence in support of their

claim"). At the same time, there was direct evidence of a dominant political motive because two legislators responsible for drawing the plan offered testimony that they "drew [the] district lines with the intent to make [it] a strong Democratic district." *Cromartie I*, 526 U.S. at 549. The circumstantial evidence of racial shifts among districts did not aid the plaintiffs' case, moreover, because "racial identification correlate[d] highly with political affiliation" in the State. *Cromartie II*, 532 U.S. at 258. On that set of facts, the Court was right to conclude that political considerations offered a strong alternative explanation for the district's lines and that "[t]he evidence taken together * * * d[id] not show that racial considerations predominated." *Id.* at 257. But *Cromartie II* does not demonstrate clear error in the district court's finding of predominance here, where there is substantial direct evidence that mechanical racial targets were employed in determining District 3's boundaries and where the legislator responsible for drawing the plan expressly disclaimed reliance on "partisan performance" as a factor influencing the map. J.S. App. 34a.

C. Appellants Are Incorrect That Race Cannot Predominate If Race And Politics Are Coextensive

Appellants contend (Br. 25) that, even if race in fact predominated in the drawing of District 3, strict scrutiny should not apply because racial and political goals coincided, such that "traditional principles independently would have led the legislature to adopt the same redistricting plan" if it had (counterfactually) not relied on race. That "harmless error" theory lacks merit in this context.

1. *Shaw I* and its progeny foreclose appellants' claim (Br. 27) that a district drawn with a predomi-

nant racial motive may escape strict scrutiny so long as "the district would have been created even absent racial considerations, in order to accomplish [a] desired political result." In adjudicating racial gerrymandering claims, this Court has emphasized that the "racial purpose of state action, not its stark manifestation, * * * [i]s the constitutional violation." *Miller*, 515 U.S. at 913. Because the equal protection injury flows from "being personally subjected to a racial classification," *Alabama*, 135 S. Ct. at 1265 (brackets, ellipses, and internal quotation marks omitted), the constitutional inquiry focuses on the legislative process, not its political consequences. "The constitutional wrong occurs when race becomes the dominant and controlling consideration," *Shaw II*, 517 U.S. at 905 (internal quotation marks omitted)—and that wrong does not evaporate simply because the legislature could have used political affiliation to produce the same district lines. Cf. *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 320 n.54 (1978) (opinion of Powell, J.) (a defendant who relies solely on "an unlawful [racial] classification" cannot "hypothesize that it might have employed lawful means of achieving the same result"). A plaintiff therefore need not make a further showing that race conflicted with politics and that the district's configuration necessarily differed from what it would have been in the absence of the impermissible racial motive.

The absence of a conflict between racial and political goals may of course be relevant if, for example, there is evidence that political calculations drove the districting decisions and race was not actually the predominant factor. But this Court's precedents provide no support for appellants' further suggestion that

the *presence* of a conflict between race and politics is an essential ingredient of a racial gerrymandering claim. See, *e.g.*, *Vera*, 517 U.S. at 967-973 (plurality opinion) (subjecting a district to strict scrutiny even though reliance on race furthered the legislature's political goals because "[t]he record disclose[d] intensive and pervasive use of race"); *Shaw II*, 517 U.S. at 907 (invalidating a district even though it "effectuated" the legislature's partisan interests because the evidence showed that, although the goals were consistent, race predominated).

Indeed, appellants' argument conflicts with this Court's recognition that an equal protection violation can occur when a State relies on race as a proxy to achieve political goals. *Vera*, for example, emphasized that "to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." 517 U.S. at 968 (plurality opinion). And in *Miller*, the Court observed that the unsupported view that "individuals of the same race share a single political interest" is "the very stereotypical assumption[] the Equal Protection Clause forbids." 515 U.S. at 914. When a jurisdiction relies on race in that manner, it is no defense that racial and political motives coincided or that political calculations prompted the use of race-based decisionmaking. Nor is it relevant that a jurisdiction might have reached the same result by relying on nonracial factors. A conflict between race and politics therefore is not required to show racial predominance.

2. Appellants rest their argument that race and politics must conflict on this Court's observation that strict scrutiny is triggered when race "subordinate[s]" traditional districting criteria and "significantly af-

fect[s]" a district's lines. *Alabama*, 135 S. Ct. at 1266, 1272. But that language merely restates the predominance test. Other traditional districting factors need not be *inconsistent* with race; it is enough if "the legislature placed race above [them]." *Id.* at 1271 (internal quotation marks omitted).

Appellants further contend (Br. 20, 27, 40-42) that *Cromartie II* requires a plaintiff to offer an alternative plan that produces the same political effects as the challenged plan but has more racially balanced districts. As previously noted, *Cromartie II* was a case involving strong direct evidence of a political motive, weak direct evidence of a racial one, and a high correlation between race and political affiliation. "[I]n a case such as th[at] one," the Court held that a plaintiff seeking to prove racial predominance primarily through circumstantial evidence "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and that "br[ing] about significantly greater racial balance." 532 U.S. at 258. That demanding evidentiary showing was necessary to try to overcome evidence of a political explanation for the legislature's decisions. But *Cromartie II* did not require such a showing in *every* racial gerrymandering case. Here, because the direct evidence of a predominant racial motive is substantially clearer than it was in *Cromartie II* and because partisan performance was not a factor that the plan's drafter considered, appellees were not required to *additionally* prove that race predominated over politics through the kind of circumstantial showing discussed in *Cromartie II*.

D. The District Court Correctly Concluded That Virginia's Use Of Race Was Not Narrowly Tailored

1. To satisfy strict scrutiny, a predominant use of race in drawing district boundaries must be narrowly tailored to advance a compelling state interest. See *Miller*, 515 U.S. at 920.[10] That standard is satisfied when a State has a "strong basis in evidence in support of the (race-based) choice that it has made." *Alabama*, 135 S. Ct. at 1274 (internal quotation marks omitted). Moreover, to avoid trapping States between competing constitutional and statutory mandates, the Court has recognized that "legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (internal quotation marks omitted). But because "mechanical interpretation of [Section] 5 can raise serious constitutional concerns," the narrow-tailoring analysis must be based on a proper understanding of what the VRA requires. *Id.* at 1273. If the legislature fails to consider the relevant question under Section 5—namely, whether districting changes are needed to maintain a minority

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[10] Because Virginia's use of race was not narrowly tailored, this Court should assume without deciding that compliance with Section 5 was a compelling state interest when Virginia drew the plan. See, *e.g.*, *Shaw II*, 517 U.S. at 915 (assuming without deciding that VRA compliance is a compelling interest); *Vera*, 517 U.S. at 977 (plurality opinion) (same). No party disputes that point here. In any event, jurisdictions previously subject to Section 5 certainly had a strong basis in evidence to believe they had a compelling interest in considering race to avoid a VRA violation. See U.S. Amicus Br. at 29-34, *Alabama*, *supra* (Nos. 13-895 and 13-1138).

group's ability to elect its preferred candidate—then the use of race cannot be justified as an effort to comply with the VRA. See *id.* at 1274.

2. The district court correctly concluded that Virginia's use of mechanical and factually unsupported racial targets for District 3 was not narrowly tailored to comply with Section 5. Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage." *Alabama*, 135 S. Ct. at 1272. Rather, it "is satisfied if minority voters retain the ability to elect their preferred candidates," *id.* at 1273, as determined by "a functional analysis." *2011 Guidance* 7471. Instead of engaging in that analysis, Virginia "relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression," *Alabama*, 135 S. Ct. at 1273, without a "strong basis in evidence" to conclude that the VRA required adherence to those rigid racial targets. See J.S. App. 39a-40a.

Virginia's focus on "the wrong question" led it to "the wrong answer," *Alabama*, 135 S. Ct. at 1274, because, as the district court found, no evidence suggested that augmenting District 3's BVAP beyond a 55% floor was necessary to prevent retrogression. District 3 "had been a safe majority-minority district for two decades," and Virginia had shown "no basis," let alone a strong one, to justify increasing its BVAP to comply with the VRA. J.S. App. 41a. The use of the 55% BVAP threshold was not informed by any functional analysis of voting patterns; it rested instead on an erroneous interpretation of what Section 5 required. *Id.* at 20a-21a, 42a & n.29.[11] And Virginia's

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[11] The Attorney General's decision not to interpose an objection to Virginia's plan does not suggest that Virginia was correct to

past experience disproved the legislature's assumption that a 55% BVAP was required to secure preclearance, as the Department of Justice had precleared prior plans even though minority ability-to-elect districts had BVAPs lower than that threshold. See J.A. 580-583, 626-627. Indeed, District 3 itself was precleared in 1998 with a BVAP of 50.47%. J.A. 580-581. Because Virginia failed to identify any "good reason" to believe its use of a mechanical and artificial racial target in District 3 was "necessary for statutory compliance," *Alabama*, 135 S. Ct. at 1274 (citation omitted), its reliance on race fails strict scrutiny.

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believe that Section 5 required increasing District 3's BVAP to satisfy a 55% floor. Review under Section 5 is limited to analyzing whether a jurisdiction has proven that a districting change neither results in retrogressive effect nor reflects a discriminatory purpose. *2011 Guidance* 7470. Preclearance accordingly does not constitute a determination that Section 5 *required* the particular districting changes, nor does it reflect a finding that the plan satisfies any other provision of law. 28 C.F.R. 51.49.

CONCLUSION

The Court should dismiss the case for lack of jurisdiction. Alternatively, the Court should affirm the district court's judgment.

Respectfully submitted.

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No. 14-1504

In the Supreme Court of the United States

ROBERT J. WITTMAN, *ET AL.*,
APPELLANTS,

V.

GLORIA PERSONHUBALLAH, *ET AL.*,
APPELLEES.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF OF ALABAMA AND TEXAS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Did the court below err in failing to make the required finding that race rather than politics predominated in District 3, where there is no dispute that politics explains the Enacted Plan?

2. Did the court below err in relieving Plaintiffs of their burden to show an alternative plan that achieves the General Assembly's political goals, is comparably consistent with traditional districting principles, and brings about greater racial balance than the Enacted Plan?

3. Regardless of any other error, was the court below's finding of a Shaw violation based on clearly erroneous fact-finding?

4. Did the majority err in holding that the Enacted Plan fails strict scrutiny because it increased District 3's black voting-age population percentage above the benchmark percentage, when the undisputed evidence establishes that the increase better complies with neutral principles than would reducing the percentage and no racial bloc voting analysis would support a reduction capable of realistically securing Section 5 preclearance?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Court should not recognize a new *Shaw-Miller* claim that makes it even more difficult for legislatures to comply with the Voting Rights Act and the Constitution at the same time 4

II. The Court should recognize a field of operation between the Voting Rights Act and the Constitution 8

A. States do not have to create majority-black districts with precise percentages 8

B. States can rely on a state-wide good faith judgment of how best to comply with federal law 10

C. A racial gerrymander exists only when the legislature could have achieved its political goals in a different way that achieves significantly greater racial balance 13

D. For strict scrutiny to apply, the use of race must *conflict* with other race-neutral districting principles 15

CONCLUSION 19

APPENDIX A - REPRESENTATIVE CASES FILED SINCE 2010 ASSERTING RACIAL GERRYMANDERING CLAIMS 1a

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995).....4

ALBC v. Alabama,
135 S. Ct. 1257 (2015).....passim

Bethune-Hill v. Virginia State Bd. of Elections,
___ F.Supp.3d ___, 2015 WL 6440332 (E.D. Va. Oct. 22, 2015).....11, 12, 15

Bush v. Vera,
517 U.S. 952 (1996).....4

Easley v. Cromartie,
532 U.S. 461 (2003).....passim

Gaffney v. Cummings,
412 U.S. 735 (1973).....15

Georgia v. Ashcroft,
539 U.S. 461 (2003).....3, 5

Miller v. Johnson,
515 U.S. 900 (1995).....6, 9, 16

Page v. Virginia State Bd. of Elections,
No. 3:13CV678, 2015 WL 3604029 (E.D. Va. 2015).....15

Reynolds v. Sims,
377 U.S. 533 (1964).....9

Shaw v. Hunt,
517 U.S. 899 (1996).....6

Shaw v. Reno,
509 U.S. 630 (1993).....4, 5, 16

Thornburg v. Gingles,
478 U.S. 30 (1986).....5

Vieth v. Jubelirer,
541 U.S. 267 (2004).....9

White v. Weiser,
412 U.S. 783 (1973).....9

Wright v. Rockefeller,
376 U.S. 52 (1964).....10

Wygant v Jackson Bd. of Educ.,
476 U.S. 267 (1986).....17

Statutes

52 U.S.C. § 10301 5

52 U.S.C. § 10304 5

Rules

Sup. Ct. R. 37.....1

Constitutional Provisions

U.S. Const., Amend. XIV.....4

Other Authorities

Ballotpedia, Majority-Minority Districts 12

Justin Levitt, All About Redistricting.....6

Trans. of Oral Argument, *Alabama Democratic Conference v. Alabama*, 13-895, 13-1138 (Nov. 12, 2014) 9, 16

INTEREST OF AMICI CURIAE

The amici States[1] redistrict every ten years for Congress and state legislatures. They want to draw lines that comply with the Constitution and the Voting Rights Act, but find it increasingly difficult to meet these dual, and sometimes inconsistent, requirements. The amici States have a strong interest in clear redistricting law that will allow legislatures to perform their redistricting function, prevent lawyer-driven litigation, and protect the rights of all voters.

The lower court's judgment imposes unrealistic and incompatible requirements on redistricters. It also threatens to create a vicious cycle of federal litigation after every decennial redistricting. The amici States therefore ask this Court to reverse the district court's judgment.

SUMMARY OF ARGUMENT

Redistricting is a minefield. And the path through it is not well-marked. A state legislature seeking to comply with federal law must think about race enough, but not too much; draw majority-minority districts when required, but shun them (even if the Department of Justice demands them) if the district is not sufficiently compact; place enough minority voters into the district to elect a candidate of choice, but not so many that the district is "packed." A step

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[1] The *amici* States do not need consent of the parties to file this brief. *See* Sup. Ct. R. 37(4).

in either direction off the narrow legal path leads to liability, attorneys' fees, and another trip through the minefield.

The lower court's decision makes the path through the minefield even more treacherous. The Court should reverse the lower court and adopt four holdings that will ensure that it is possible for redistricters going forward to draw districts that comply with federal law:

1. A dispute over three population percentage points should not be enough to make a racial gerrymandering claim. Virginia is criticized for drawing a 56.3% black district when it was previously a 53.1% black district. If 3 percentage points is sufficient to make a racial gerrymandering claim, then States will be faced with such precise requirements that it will be practically impossible to meet their legal obligations without costly litigation.

2. States ought not be required to conduct extensive studies of voter registration, voter turnout, and election results for individual districts to prove that they have a "strong basis in evidence" in support of their choices. A good-faith state-wide determination, of the sort that Virginia made, should suffice.

3. This Court should reaffirm that, at a minimum, plaintiffs in a racial-gerrymandering claim are required to show, through an alternative map, that the legislature could have reached its political goals in an alternative way while achieving *significantly* greater racial balance. *Easley v. Cromartie*, 532 U.S. 461 (2003).

4. This Court should also hold that to show that race predominated over traditional districting principles, a plaintiff must prove that the State's use of race *contradicted* those districting principles.

The amici States ask for these holdings not as a safe harbor for racial discrimination, but to ensure that there is meaning to this Court's acknowledgment that "[t]he law cannot lay a trap for an unwary legislature." *ALBC v. Alabama*, 135 S. Ct. 1257, 1273–1274 (2015).

ARGUMENT

The amici States embrace the Constitution's prohibitions against racial discrimination and the goal of the Voting Rights Act "to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003). But federal law presently requires a near fixation on race that imposes inconsistent demands on line-drawers. The result is that States have little room to operate, their legal responsibilities are ill-defined and ever-changing, and legislatures must defend every redistricting plan in court.

The lower court's decision exacerbates the difficulty of complying with federal law. It should be replaced with a decision that recognizes a field of operation between what the Voting Rights Act requires and the Equal Protection Clause prohibits.

I. The Court should not recognize a new *Shaw-Miller* claim that makes it even more difficult for legislatures to comply with the Voting Rights Act and the Constitution at the same time.

The district court imposed an erroneous, too-exacting standard that exacerbates the States' difficulty in complying with the competing requirements of the Voting Rights Act and Constitution. It has become axiomatic that the Voting Rights Act and Equal Protection Clause impose inconsistent, and sometimes incompatible, obligations on States in redistricting. "On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under [the Equal Protection Clause]". *Bush v. Vera*, 517 U.S. 952, 1037 (1996) (Stevens, J., dissenting).

The Constitution counsels against racial classifications. "Classifications of citizens solely on the basis of race 'are by their very nature odius to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) ("*Shaw I*"). The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1. It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

But this Court's interpretation of the Voting Rights Act requires redistricters to draw majority-minority districts to protect the ability of minority voters to elect candidates of their choice. Section 2 requires these districts if the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," is "politically cohesive," and when "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986);[2] *see also* 52 U.S.C. § 10301. For States that were subject to Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, a plan that did not maintain the same number of majority-minority districts as in a previous plan would not have been precleared. As Justice Kennedy has explained, "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 seem to be what save it under §5." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

Indeed, although the Voting Rights Act requires that States draw majority-minority districts, this Court has held that States may *not* draw such districts "to segregate voters into separate voting districts because of their race" without sufficient justification. *Shaw I*, 509 U.S. at 658. A district is

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[2] Of course, liability under Section 2 is established only if a plaintiff proves, based on the totality of the circumstances, that the failure to draw a majority-minority district denies members of the relevant minority group the equal opportunity to "participate in the political process and to elect representatives of their choice," 52 U.S.C. § 10301(b).

subject to strict scrutiny if a plaintiff proves "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Shaw v. Hunt*, 517 U.S. 899, 905 (1996) ("*Shaw II*"). And sufficient justification does not exist – the district is not narrowly tailored to serve a compelling State interest – when the district is so irregular that drawing it was not necessary to comply with § 5's anti-retrogression requirement or the requirements of § 2. *Id.*

These "*Shaw-Miller*" claims have embroiled courts even further into redistricting and eliminated certainty for state legislatures. Now courts undertake a detailed, district-by-district analysis of compactness, precinct and county splits, demographics, and the like, for virtually every majority-minority district drawn. *See, e.g., Bush*, 517 U.S. 952. As a practical matter, it is impossible for State actors to know ex ante when race goes from being a permissible (and required) consideration to an impermissible "dominant and controlling" one. Redistricting has become "perilous work for state legislatures" and federal judges "in large numbers" have been "drawn into the fray." *Miller*, 515 U.S. at 949 (Ginsburg, J., dissenting).

The degree of uncertainty in the law is reflected in the number of legal challenges. By one count, all but eleven states have faced challenges to their Congressional or State legislative plans (or both), in over 200 lawsuits, since the 2010 census (and more than 30 of those cases are active). *See* Justin Levitt, All About Redistricting, available at

http://redistricting.lls.edu/cases.php#IN (last visited Dec. 28, 2015). In Appendix A to this brief, amici attach a list of known cases raising racial gerrymandering claims to plans drawn after the 2010 census.

In light of this background, the Court should be wary of recognizing the new flavor of *Shaw-Miller* claim presented by this case. The plaintiffs argue, not that the State erred in creating or preserving a majority-black district, but that the State went just a little too far in achieving its undisputed Voting-Rights-Act obligation. Unlike in *Shaw*, the plaintiffs concede that Section 5 required the government to maintain District 3 in the Virginia Congressional plan as an "ability-to-elect" district. They concede that the government had to consider race to ensure that the district allowed black voters the opportunity to elect a candidate of choice. And they concede, apparently, that the government would have been justified in maintaining a district that is 53.1% black.

The only meaningfully dispute is whether the government went too far by creating a district that is 56.3% black instead of 53.1% black. By recognizing this kind of claim, the district court effectively eliminated the zone of operation between the Constitution's prohibitions and the Voting Rights Act's demands. This Court should not make it even more difficult for legislatures to comply with the Voting Rights Act and the Constitution at the same time.

II. The Court should recognize a field of operation between the Voting Rights Act and the Constitution.

The district court made four discrete errors that this Court should rectify. By reversing the district court on each of these four points, the Court would provide much needed guidance and certainty to redistricters going forward.

A. States do not have to create majority-black districts with precise percentages.

The district court's first error was its conclusion that the 3% difference between the 53% black baseline district and the 56% black replacement district was constitutionally significant. The district court held that because Virginia put 3% more black persons in District 3 than "necessary," the district fails constitutional muster. That standard is both unwise and unfair.

First, requiring this kind of precision in redistricting eliminates any daylight between what the Voting Rights Act requires and the Constitution prohibits. "The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few." *ALBC*, 135 S. Ct. at 1273–1274. The States should not have to hit a six-percent-wide "sweet spot." *See* Trans. of Oral Argument, *Alabama Democratic Conference v.*

Alabama, 13-895, 13-1138, at 5:13 (Nov. 12, 2014) (question of Chief Justice Roberts). But that is the standard that the district court imposed.

Second, such exacting judicial review of the minutiae of redistricting is contrary to the proper role of courts in evaluating redistricting challenges. The Court has long recognized that "'reapportionment is primarily a matter for legislative consideration and determination.'" *White v. Weiser*, 412 U.S. 783, 794 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). It requires drawing sometimes arbitrary, "inconsistent, illogical, and ad hoc" lines between groups of voters. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). *Accord id.* at 306–07 (Kennedy, J., concurring in the judgment) (noting "lack of comprehensive and neutral principles for drawing electoral boundaries"). A legal standard that draws constitutional lines based on 3% of a district's population "risk[s] assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307 (Kennedy, J., concurring in the judgment).

Third, a 3% population difference does not reflect a "significant number" of people under this Court's racial gerrymandering caselaw. The Court has consistently directed lower courts to look at "significance" in evaluating racial gerrymandering claims. In *Miller*, the Court held that race is predominant only if a "significant number" of people are put in or out of a district in contravention to traditional districting principles. 515 U.S. at 916. *See also Easley*, 532 U.S. at 258 (requiring plaintiffs to produce an alternative plan showing that the

legislature could have achieved "*significantly* greater racial balance" while meeting its political goals) (emphasis added). When this Court said in *Miller* and *ALBC* that race predominates only when a "significant number" of people are moved in or out of a district, it meant something substantially more than three percentage points.

Finally, the district court ignored the reality that many majority-minority districts are naturally occurring at higher than 56% minority. Indeed, without abandoning traditional districting principles, it would be impossible in most cases for States to create majority-minority districts at lower than 56% black. *Cf. Wright v. Rockefeller*, 376 U.S. 52, 56–58 (1964) (recognizing that segregated residential patterns make such districts inevitable). If exceeding a benchmark by 3% is enough to give rise to a racial gerrymandering claim, States will have to defend these naturally-occurring districts in expensive and protracted litigation. And, in practice, redistricters will keep an even more watchful eye on race by seeking out people of the majority race to put in a district when it reaches the benchmark level of minority voters.

B. States can rely on a state-wide good faith judgment of how best to comply with federal law.

The district court's second error was its holding that state legislators must commission district-specific voter registration and voter turnout analysis before they can constitutionally draw majority-minority districts. Legislators frequently rely on

state-wide voter data, historical practices, and their own political experience to make determinations about how many minority voters need to be in a district to affect the outcome of the election in that district. This Court should reject the premise that States must undertake a series of detailed studies to determine precisely what size racial majority is needed in each district for minority voters to elect their candidate of choice. [3]

No one needs a study to know that the Voting Rights Act requires the government to ensure that the minority voters in a majority-minority district actually have the ability to elect a candidate of choice. Under Section 5, the legislature must show that size of the minority-voter population is sufficient for "minority voters [to] retain the ability to elect their preferred candidates." *ALBC*, 135 S. Ct. at 1273. And Section 2, as interpreted by this Court, requires the legislature to show that its enacted plan does not result in vote dilution. Either under Section 5 or Section 2, a legislature must put enough minority voters in an ability-to-elect district to avoid vote dilution or retrogression by giving politically

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[3] Some have criticized the use of any target at all. But, as another three-judge court recently held in Virginia, "[i]f the use of a BVAP threshold—any BVAP threshold—is sufficient to trigger strict scrutiny in the absence of a facial manifestation in the lines themselves through the subordination of traditional redistricting principles, then the constitutionality of the Voting Rights Act—as applied to redistricting—would be drawn into question." *Bethune-Hill v. Virginia State Board of Elections*, ___ F.Supp.3d ___, ____, 2015 WL 6440332 at *17 (E.D. Va. Oct. 22, 2015).

cohesive minority voters the ability to elect their candidate of choice.

Unlike the lower court, this Court has previously afforded legislators significant leeway in determining the number of minority voters that need to be in a district. The Court has held that legislators are not required to identify "precisely" what size minority population is required in an ability-to-elect district. *ALBC*, 135 S. Ct. at 1273. A legislature might have reason to believe that, in a specific district, a particular population is necessary to comply with the Voting Rights Act, even though that population would not be necessary elsewhere in the State. But there is no constitutional requirement that a Legislature study the issue instead of establishing a single state-wide target for all ability-to-elect districts. State legislators, not political science professors, are charged with the primary task of redistricting.

Moreover, as a practical matter, it is not feasible for legislators to hire experts to conduct numerous district-specific voter turnout and registration studies as part of a state-wide redistricting. In Alabama, for example, there are eight majority-minority Senate districts and at least 27 majority-minority House districts. *ALBC*, 135 S. Ct. at 1263. In Virginia, there are 12 majority-minority House districts. *Bethune-Hill*, 2015 WL 6440332 at *2. As of 2013, there were 113 Congressional majority-minority districts in the United Sates. *See* Ballotpedia, Majority-Minority Districts at https://ballotpedia.org/Majority-minority_districts (last visited Dec. 28, 2015).

The Equal Protection Clause is about an equal playing field, not full employment for political scientists. The Virginia Legislature did not need an expert's district-specific analysis to conclude that a 55% black majority was reasonably necessary to ensure that black voters could elect their candidate of choice in District 3.

C. A racial gerrymander exists only when the legislature could have achieved its political goals in a different way that achieves significantly greater racial balance.

The district court's third error was its conclusion that the plaintiffs had established a racial gerrymander even though the State's plan is the only known plan that achieved its drafters' political goals.

A racial gerrymandering claim cannot succeed absent proof of a realistic alternative plan that achieves the legislature's political objectives in a meaningfully different way. In *Easley*, this Court held that a *Shaw* plaintiff must, "at the least," produce an alternative plan showing that the legislature could have achieved its "legitimate political objectives" while also achieving "significantly greater racial balance." 532 U.S. at 258.

Implicit in the *Easley* Court's reasoning are two bedrock principles. First, there are important political goals that drive every redistricting effort, and any alternate plan that does not take those into account is illegitimate on its face. And second, no plan is perfect. If those who wish to challenge a

redistricting plan can succeed simply by showing some marginal increase in racial balance, redistricting challenges will cease to be about promoting racial equality and instead will become powerful political weapons. The racial gerrymandering cause of action will be nothing more than a partisan tool.

This danger is particularly acute given the high stakes of every redistricting effort and the multitude of competing and often conflicting priorities of those involved in the process. "Legitimate political goals" and "traditional districting principles" are varied, and often mutually exclusive. They include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *ALBC*, 135 S. Ct. at 1270 (citations and internal quotation marks omitted). Sometimes observing one of the principles requires disregarding another. A legislature may choose to keep a county whole, for example, even if it makes a district less compact. Or it may choose to split a precinct it would like to keep whole, in order to avoid an incumbent conflict. In the push-and-pull of politics, there is virtually no limit to the choices a legislature has when drawing district lines, and that remains true even when the legislature remains faithful to traditional districting principles. It depends on which of those principles manifest as most important on a given occasion, and reasonable line-drawers can disagree about which principles take priority at different times.

But when the dust clears, the final product will result in political winners and losers. Redistricting

"must end at some point," but "that point constantly recedes if those who litigate need only produce a plan that is marginally 'better.'" *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973). Requiring that those who would launch a race-based challenge to the outcome of the redistricting process must produce an alternative plan that takes into account political objectives and demonstrates "*significantly* greater racial balance" ensures that political fights are in the legislature, instead of court. *Easley*, 532 U.S. at 258 (emphasis added).

D. For strict scrutiny to apply, the use of race must *conflict* with other race-neutral districting principles.

The lower court's fourth error was in finding that race predominated in part because a legislator testified that compliance with § 5 was "paramount" and that the federal mandate was "nonnegotiable." J.S. App. 2a. The question in a racial gerrymandering case is not whether the Voting Rights Act is subjectively important, but whether a redistricter's race-related objectives *conflicted* with its race-neutral objectives. *See Bethune-Hill*, 2015 WL 6440332 at *15, citing *Page v. Virginia State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *27 (E.D. Va. 2015) (Payne, J., dissenting).

Many factors go into a state-wide redistricting plan. A redistricter might choose to move one precinct over another with awareness of the racial composition of each, but may have many motives for the move, such as producing a district that favors a political party, connecting members of a community

of interest, *etc.* "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw I*, 509 U.S. at 646. Because this Court is aware of these complications, it has held that strict scrutiny applies only when race was "not simply . . . a motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." *Easley*, 532 U.S. at 241 (citation and internal quotation marks omitted). Strict scrutiny applies only upon demonstration that "'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.'" *Bush*, 517 U.S. at 958 (quoting *Miller*, 515 U.S. at 913.)

The Court reiterated these principles in *ALBC*, underscoring that predominance requires a showing that race-neutral districting principles *conflict* with a drafters' goal of complying with the Voting Rights Act. There, the U.S. Solicitor General argued that "predominance" is shown only where race-neutral objectives and a race-related objective *conflict*. Trans. of Oral Argument, *Alabama Democratic Conference v. Alabama*, 13-895, 13-1138, 31:18–32:6, 37:15–38:2 (Nov. 12, 2014). This Court agreed and explained that a racial gerrymandering plaintiff must "prove that the legislature subordinated traditional race-neutral districting principles"—including the "offsetting" principles of "incumbency protection" and "political affiliation"—"to racial considerations." *ALBC*, 135 S. Ct. at 1270 (quoting *Miller v. Johnson*, 515 U.S. at 916 (emphasis in *ALBC* omitted). If a

race-related goal *coincides* with a race-neutral principle, instead of *conflicting* with it, then a redistricter could not have "subordinated" that principle to "racial considerations." *Id.*

Testimony that a legislature made compliance with federal law its highest priority does not show that race "predominated." *Of course* producing a legal plan is the goal. Compliance with the Voting Rights Act is not optional. Any other rule would render constitutional compliance with federal law impossible. But the importance of the Voting Rights Act is irrelevant to the analysis of whether compliance with the Voting Rights Act required the Legislature to do anything that conflicted with other race-neutral objectives, such as incumbent protection. The Court should emphasize that the *Shaw-Miller* standard requires a showing of *conflict* between race-related and race-neutral objectives.

* * *

State actors should not be "trapped between the competing hazards of liability" by the imposition of unattainable requirements under the rubric of strict scrutiny. *Wygant v Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in judgment). But the lower court's reasoning would trap legislatures in exactly that way.

The Court should reverse and make clear that (1) a 56% majority-minority district is not a racial gerrymander just because it could have been a 53% majority-minority district; (2) States are not required to make separate findings for each majority-minority district of what precise size majority is necessary for

a group to elect its candidate of choice; (3) every plaintiff in a racial gerrymandering claim must produce an alternative map showing that the legislature could have achieved its political goals in another way while achieving *significantly* greater racial balance; and (4) to show that race predominated over traditional districting principles, a plaintiff must show that the use of race actually conflict with those principles.

CONCLUSION

The Court should reverse the judgment of the Eastern District of Virginia.

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APPENDIX A

Representative Cases Filed Since 2010 Asserting Racial Gerrymandering Claims

Covington v. North Carolina, No. 1:15-cv-00399 (M.D.N.C.)

Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super Ct., Wake County)

NC State Conference of Branches of the NAACP v. North Carolina, No. 11-CVS-16940 (N.C. Super Ct., Wake County)

Backus v. South Carolina, No. 3:11-cv-03120 (D.S.C.)

Buckley v. Schedler, No. 3:13-cv-00763 (M.D. La.)

Ceasar v. Jindal, No. 6:12-cv-02198 (W.D. La.)

Radogno v. Illinois State Board of Elections, No. 1:11-cv-04884 (N.D. Ill.)

Committee for a Fair and Balanced Map v. Ill. State Bd. of Elections, No. 1:11-cv-05065 (N.D. Ill.)

Baldus v. Brennan, No. 2:11-cv-00562 (E.D. Wis.)

Jeffers v. Beebe, No. 2:12-cv-00016 (E.D. Ark.)

Radanovich v. Bowen, No. S196852 (Cal. Sup. Ct.)

Bethune-Hill v. Va. State Bd. of Elections, ___ F.Supp.3d ____, 2015 WL 6550332 (E.D. Va. Oct. 22, 2015)

Perez v. Texas, No. 5:11-cv-360 (W.D. Tex.)

No. 14-1504

IN THE
Supreme Court of the United States

ROBERT J. WITTMAN, ET AL.,

Appellants,

v.

GLORIA PERSONHUBALLAH, ET AL.,

Appellees.

On Appeal From The United States District Court for The Eastern District of Virginia

BRIEF OF THE CAMPAIGN LEGAL CENTER, THE LEAGUE OF WOMEN VOTERS, THE VOTING RIGHTS INSTITUTE, AND THE NATIONAL COUNCIL OF JEWISH WOMEN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. As The District Court Found, Direct Evidence Shows That Race Predominated In The Creation Of District 3. 5

A. *Shaw* Claims May Be Established Either Through Direct Or Circumstantial Evidence. 5

B. Strong Direct Evidence Of Legislative Purpose Establishes The Predominance Of Race In The Formation Of District 3. 7

II. Post-Hoc Partisan Effects Cannot Override Direct Evidence Of Racial Gerrymandering. 10

III. Permitting The Purposeful Use Of Race As A Proxy For Politics Offends The Constitution. 13

IV. An Alternative Plan Is Unnecessary Where, As Here, Direct Evidence Establishes The Predominance Of Race In Redistricting. 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) 6, 7, 9

Bush v. Vera, 517 U.S. 952 (1996) 11, 16

Easley v. Cromartie, 532 U.S. 234 (2001) 7, 10, 14, 17, 18

Hunt v. Cromartie, 526 U.S. 541 (1999) 7, 11, 17, 18

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 15

Miller v. Johnson, 515 U.S. 900 (1995) 5, 6, 7, 11, 14, 19

Powers v. Ohio, 499 U.S. 400 (1991) 14

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Shaw v. Reno, 509 U.S. 630 (1993) 5, 6, 14

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Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 Harv. L. Rev. Forum 58 (2014) 11

INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae the Campaign Legal Center, Inc. (the "CLC") is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation regarding voting rights. The CLC has served as *amicus curiae* or counsel in numerous voting rights and redistricting cases in this Court, including *Harris v. Arizona Independent Redistricting Commission*, No. 14-232; *Evenwel v. Abbott*, No. 14-940; *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion County*, 553 U.S. 181 (2008). The CLC has a demonstrated interest in voting rights and redistricting law.

Amicus curiae the League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800 communities and in every state, with more than 150,000

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Written consent from all parties to the filing of this brief is being submitted concurrently with this brief.

members and supporters nationwide. The League promotes an open governmental system that is representative, accountable, and responsive. The League has been a leader in seeking reform of the redistricting process at the state, local, and federal levels for more than three decades.

Amicus curiae the Voting Rights Institute at Georgetown Law ("VRI") was founded in 2015 to train the next generation of lawyers and leaders and to litigate voting rights cases throughout the nation. VRI recruits and trains expert witnesses to assist in litigation development and presentation; promotes increased local and national focus on voting rights through events, publications, and the development of web-based tools; provides opportunities and platforms for research on voting rights; and offers opportunities for students, recent graduates, and fellows to engage in litigation and policy work in the field of voting rights.

Amicus curiae the National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "[e]lection laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified."

SUMMARY OF ARGUMENT

Appellants argue that in order to show that race predominated in the drawing of a district, a plaintiff must establish that race conflicts with other principles of redistricting, including a legislature's political goals. In Appellants' view, if racial considerations cause no departure from the lines that otherwise might have been drawn for political reasons, there can be no subordination of neutral redistricting principles. This conclusion underlies not only Appellants' proposed predominance analysis, but also their insistence that all plaintiffs alleging a racial gerrymandering claim must produce an alternative plan that can equally achieve the legislature's political goals.

Appellants' argument has dangerous consequences in the context of racial gerrymandering cases—such as the present case—premised on direct evidence of racial discrimination. Appellants' proposed standard for determining racial predominance would allow the incidental political benefits of a racial gerrymander to excuse a plan—such as this one—premised on explicitly racial intent. Indeed, redistricters could set racial quotas for all districts and then later justify them simply by showing that the districts also benefit the party in power politically. If a plan's ultimate partisan effects can overcome direct evidence of racial intent, racial gerrymandering claims would largely be rendered a nullity.

Appellants' position is untenable because it sanctions the impermissible use of race as a proxy to achieve partisan gains. Under Appellants' view, so long as the intentional use of race to achieve political ends is

coextensive with the legislature's political goals, there can be no successful racial gerrymandering claim. By effectively excusing racial stereotyping on the basis of its consistency with political ends, Appellants would grant legislatures free rein to openly use racial stereotypes in redistricting.

Appellants' insistence on an alternative plan that achieves a legislature's political goals while also bringing about significantly greater racial balance would likewise stymie racial gerrymandering claims predicated on direct evidence of racial discrimination. As this Court has recognized, such alternative plans serve a useful evidentiary function for racial gerrymandering claims when those claims are premised on *circumstantial* evidence. In the absence of direct evidence of racial motivation, and in light of the strong correlation between race and politics, evidence of a conflict between race and party may be useful to dispel an equally plausible alternative explanation of partisanship. However, such a plan is unnecessary to ferret out evidence of racial discrimination when there is already *direct* evidence of such intent. To impose an alternative plan requirement upon all plaintiffs raising racial gerrymandering claims, even those relying on direct evidence, would simply adopt Appellants' erroneous predominance analysis in another form.

This Court should decline Appellants' invitation to radically reshape racial gerrymandering doctrine and permit the explicit use of race as a proxy to achieve political goals.

ARGUMENT

I. As The District Court Found, Direct Evidence Shows That Race Predominated In The Creation Of District 3.

A plaintiff bringing a racial gerrymandering claim under *Shaw v. Reno*, 509 U.S. 630 (1993), can establish that race predominated in the formation of a district either through direct evidence of legislative purpose, or circumstantial evidence based on a district's shape and demographics. Here, Appellees established, and the district court found, direct evidence of racial predominance in the creation of District 3, based primarily on the admissions of the redistricting plan's primary drafter.

A. *Shaw* Claims May Be Established Either Through Direct Or Circumstantial Evidence.

The Equal Protection Clause prevents states from "purposefully discriminating between individuals on the basis of race." *Shaw*, 509 U.S. at 642. In the redistricting context, the Equal Protection Clause protects individuals against "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Id.* at 640 (internal quotation marks omitted) (alterations in original).

To bring a claim of racial gerrymandering, a plaintiff must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Race predominates in the redistricting process

if the legislature "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Once a plaintiff establishes that the legislature used race as a predominant factor in drawing a district's boundaries, the Equal Protection Clause requires the boundaries to be narrowly tailored to serve a compelling state interest. *Shaw*, 509 U.S. at 686. Otherwise, the challenged district violates the Constitution.

At the first stage of this analysis, *Shaw* plaintiffs can prove that race was the predominant factor in districting in two ways, either through "circumstantial evidence of a district's shape and demographics" or through "more direct evidence going to legislative purpose." *Miller*, 515 U.S. at 916.

With respect to direct evidence of racial gerrymandering, the Court has looked primarily to evidence of legislators' beliefs and communications. "[S]trong, perhaps overwhelming" direct evidence of racial predominance exists where legislators make clear that "a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015). Where direct evidence establishes that race was the criteria that "could not be compromised," *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("*Shaw II*"), the district court need only determine whether that use survives strict scrutiny.

However, in the absence of sufficient direct evidence of race-based gerrymandering, a plaintiff may turn to more equivocal "circumstantial evidence of a district's shape and demographics" to show that race predominated. *Miller*, 515 U.S. at 916. Circumstantial evidence can consist of district maps as well as "statistical and demographic evidence with respect to the precincts that were included within [the challenged district] and those that were placed in neighboring districts." *Hunt v. Cromartie*, 526 U.S. 541, 547-48 (1999).

B. Strong Direct Evidence Of Legislative Purpose Establishes The Predominance Of Race In The Formation Of District 3.

Here, the three-judge court found that race was the predominant factor in the drawing of District 3 based on direct evidence of legislative purpose. This finding is not clearly erroneous. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Indeed, such evidence mirrors the direct evidence of racial motive accepted in this Court's prior cases, including most recently in *Alabama Legislative Black Caucus*, 135 S. Ct. at 1271-72.

As the district court found, the legislative record is "replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan." J.S. App. 18a. Most prominently, Delegate Janis, the author of the challenged plan, expressly and repeatedly stated that his "primary focus" in designing District 3 was to ensure that it "maintained at least as large a percentage of African-American voters as had been in the district under the Benchmark Plan." *Id.* at 22a. In order to achieve this "paramount" concern, the

legislature adopted a mechanical requirement that the district be comprised of no less than 55% Black Voting Age Population ("BVAP"). *Id.* at 20a, 23a.

Although Delegate Janis's purported reason for setting this racial target was compliance with the Voting Rights Act ("VRA"), *id.* at 23a, the record reveals that Delegate Janis sought to comply with federal law through a "nonnegotiable," and unnecessary, racial quota for District 3. *Id.* at 22a-23a (quoting Delegate Janis: "[W]e can have no less [percentage of African-American voters] than percentages that we have under existing lines . . . ." (alterations in original)). When pressed about whether there was "any empirical evidence whatsoever that 55[% BVAP] is different than 51[%] or 50[%]" or if it was "just a number that has been pulled out of the air," Delegate Janis admitted that he did not know if such a rigid minimum was actually necessary to maintain the minority community's ability to elect its candidate of choice in District 3. *Id.* at 21a (alterations in original). The legislature never conducted any functional analysis, nor any analysis at all about the minority community's ability to elect in District 3. *Id.* at 9a.

Yet the Virginia legislature could hardly claim any genuine misunderstanding that the VRA required it to mandate a 55% BVAP in order to avoid a finding of impermissible retrogression. The Department of Justice had previously granted preclearance for iterations of District 3 with BVAPs lower than 55%. J.A. 580-83. And in this very redistricting cycle, when the Virginia State Senate drew its redistricting plan based on the 2010 census, it reduced the BVAP in all

majority African-American Senate districts below 55% and nevertheless received preclearance for its plan. J.A. 626-27; Int. Ex. 34 at 24. Hence, the Virginia legislature knew, through first-hand experience, that compliance with the VRA did not require the use of a fixed 55% BVAP floor.

Such direct evidence of racial predominance mirrors the evidence relied upon in prior cases. Most recently, in *Alabama Legislative Black Caucus*, a nearly identical use of "mechanical racial targets" in redistricting was deemed "strong, perhaps overwhelming, evidence that race did predominate as a factor." *Alabama Legislative Black Caucus*, 135 S. Ct at 1271. There, echoing the circumstances here, the Court relied on evidence that "[t]he legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible." *Id.* There, too, the Alabama legislature—just like the Virginia legislature—conducted no "functional analysis" of minority ability to elect, relying instead on "a mechanically numerical view as to what counts as forbidden retrogression." *Id.* at 1272-73 (internal quotation marks omitted). Likewise, in *Shaw II*, testimony from the principal draftsman of a redistricting plan that two districts were created to "assure black-voter majorities" provided strong "direct evidence of the legislature's objective." *Shaw II*, 517 U.S. at 906 (internal quotation marks omitted).

II. Post-Hoc Partisan Effects Cannot Override Direct Evidence Of Racial Gerrymandering.

Appellants dismiss this classic direct evidence of racial gerrymandering as immaterial, arguing that it is irrelevant "whether the Legislature rank-ordered 'race' above 'politics'" so long as politics can *also* "explain[] the district." Appellants' Br. at 30. Under this view, race must always be in actual conflict with a legislature's political goals in order to predominate. *See* Appellants' Br. at 15 (asserting that "a *Shaw* violation cannot conceivably be found . . . where any potential subordination [of neutral principles to race] clearly serves the Legislature's 'legitimate political objectives'"). Where lines explicitly drawn on the basis of race can be later justified by reliance on politics, Appellants argue there can be no *Shaw* violation.

Appellants' position effectively eviscerates this Court's racial gerrymandering doctrine. Under Appellants' position, the predictable partisan benefits from a racial gerrymander would excuse even the most egregious direct evidence of racial discrimination. Appellants' new proposed standard for predominance—wherein race never predominates if it is coextensive with political goals—ignores the clear guidance of *Shaw* and its progeny. By asking the wrong question—what *can* explain the district rather than what *actually* motivated the legislature when drawing the district—Appellants arrive at the wrong answer.

As this Court has recognized, racial gerrymanders often resemble partisan gerrymanders given the strong correlation between race and party. *Easley*, 532 U.S. at 257 ("That is because race in this case correlates closely

with political behavior."); *see also* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 Harv. L. Rev. Forum 58, 61 (2014) (noting that "[w]hen party and race coincide, as . . . they do today, it is much harder to separate racial and partisan intent and effect"). Such a correlation, standing alone, is obviously insufficient to show a *Shaw* violation. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify."). However, by the same logic, such a correlation, standing alone, should be equally insufficient to *defeat* a *Shaw* claim.

Just as it is possible to draw a compact district that discriminates on the basis of race, *see Miller*, 515 U.S. at 915, it is possible (and indeed likely) that a district drawn on the basis of race will also have partisan benefits. While this Court has held that the pursuit of political goals in districting, based on political data, is not unconstitutional "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact," *Hunt*, 526 U.S. at 551 (emphasis omitted), the Court has never held that purposeful racial gerrymandering is constitutional just because packing African-American voters also benefits Republican legislators.

The key question in a *Shaw* claim is which criteria "could not be compromised." *Shaw II*, 517 U.S. at 907 ("That the legislature addressed [other] interests does not in any way refute the fact that race was the

legislature's predominant consideration. Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made."). In other words, the key inquiries are *why* the legislature drew the district and *how* it went about doing so. The fact that political goals can explain a district's boundaries after the fact, or that there is no conflict between race and politics, does not negate direct evidence demonstrating that race was the "criterion that, in the State's view, could not be compromised." *Id.* at 907.

As discussed above, the district court here found direct and irrefutable evidence of a racial motive in drawing the districts. Direct evidence of partisan motivation, by contrast, is missing from the record. Indeed, when asked whether he had "any knowledge as to how this plan improves the partisan performance of . . . incumbents in their own district," the plan's author Delegate Janis stated that "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." J.A. 456. Nevertheless, Appellants now ask the Court to overlook direct evidence of racial target-setting, and assume that a partisan motive existed in the drawing of the district simply because the chosen boundaries have the *effect* of conferring a partisan benefit.

Given the strong correlation between race and partisanship, Appellants' reasoning would permit virtually any purposeful use of race in redistricting so long as there were (as there are likely to be)

overlapping incidental political benefits. Appellants effectively ask the Court to assume that partisan motivation is not only a predominant factor in this plan, but that it is the predominant factor in *every* redistricting plan in which race and party are linked. The Court should decline Appellants' invitation to accept post-hoc partisan rationalizations. A partisan explanation is not talismanic and the ultimate partisan benefits of a plan cannot save a blatant racial gerrymander.

III. Permitting The Purposeful Use Of Race As A Proxy For Politics Offends The Constitution.

Beyond simply allowing incidental partisan effects to excuse direct evidence of a racial gerrymander, Appellants' proposed standard for predominance would actually sanction the use of race as a proxy for political affiliation, in violation of this Court's precedent. Under Appellants' theory, purposeful racial gerrymandering to achieve political ends is constitutional so long as it is effective. That cannot be the law.

As part of their predominance analysis, Appellants contend that the use of racial classifications is permissible so long as it is in service of partisan goals. *See* Appellants' Br. at 53 (asserting that "*Shaw* does not condemn racially-influenced line-drawing that *comports* with traditional principles, only that which *subordinates* such principles"). As long as lines drawn purposefully on the basis of race do not differ from lines that might have been drawn on the basis of politics, Appellants believe there is no *Shaw* violation. Appellants' Br. at 15 ("Since race therefore causes no departure from the lines that would be drawn absent

race, it cannot subordinate those race-neutral line-drawing principles.").

This argument flies in the face of this Court's prohibition on the use of race as a proxy for political affiliation. This Court has repeatedly and emphatically held that the purposeful use of race data to achieve partisan goals trades on impermissible racial stereotypes and violates the Equal Protection Clause. Indeed, "where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates." *Miller*, 515 U.S. at 920 (quoting *Shaw*, 509 U.S. at 647); *Easley*, 532 U.S. at 257 (reiterating that a legislature may not "defend its districting decisions based on a 'stereotype' about African-American voting behavior"); *id.* at 266-67 (Thomas J., dissenting) ("It is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters."); *cf. Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence.").

The use of racial classifications for political ends is precisely the type of line-drawing that "may balkanize us into competing racial factions . . . threaten[ing] to carry us further from the goal of a political system in which race no longer matters." *Shaw*, 509 U.S. at 657. Such racial stereotyping in order to achieve partisan goals not only employs unconstitutional assumptions and racial stereotypes, but also impermissibly targets and diminishes minority voting power. Accordingly,

this Court has affirmed that partisan goals do not immunize purposeful attempts to limit minority voting power. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation."). Racial gerrymandering is not constitutional simply because the legislature chooses to sort minority voters based on anticipated benefits to Republican legislators.

Appellants' proposed standard for predominance would excuse such discrimination, even when supported by direct evidence. Indeed, Appellants apparently see no problem with the use of race so long as it serves political goals, essentially elevating the goal of partisan gerrymandering to the ranks of a compelling government interest. *See* Appellants' Br. at 18 ("[E]ven assuming *arguendo* that the Legislature required an inflexible 55% (or 53%) BVAP 'floor,' this could not violate *Shaw* because achieving that floor was the best . . . way to accomplish the Legislature's conceded partisan and incumbency protection objectives."). However, it is precisely this distinction, between the use of political data to serve partisan goals and the use of race to serve the same partisan goals, that marks the line between permissible and impermissible gerrymandering. As this Court has made clear: "If the State's goal is otherwise constitutional political gerrymandering, it is free to use . . . political data . . . to achieve that goal regardless of its awareness of its racial implications . . . . But to the extent that race is used as a proxy for political characteristics, a racial

stereotype requiring strict scrutiny is in operation." *Bush*, 517 U.S. at 968. By excusing such racial stereotyping based on the ultimate political gains, Appellants would allow redistricting authorities to openly use race as a proxy for political affiliation.

Such a concern is not merely speculative. To the extent Appellants offer evidence that the boundaries of District 3 were motivated by politics, it appears these partisan gains were achieved through the impermissible use of racial stereotypes. Indeed, in arguing that political goals actually motivated the formation of District 3, Appellants effectively concede the use of race as a proxy for political affiliation. *See* Appellants' Br. at 19 (explaining that "preserving District 3's . . . BVAP was a political and incumbency-protection *necessity* because any serious . . . reduction in BVAP would send a significant number of overwhelmingly Democratic voters into the four adjacent districts, *all* of which had Republican incumbents"). Given the admission of Delegate Janis that he did not consult partisan performance data in drawing the district and instead consulted racial data, J.A. 456, it is clear that race was used as a proxy for political affiliation. That it may have been in this instance a reliable proxy does not make the practice any less odious.

Appellants' proposed predominance standard—requiring that race and party point in opposite directions—would eliminate the critical distinction this Court has repeatedly emphasized between lines drawn based on political data, with racial effects, and lines drawn based on racial stereotypes for political ends.

Such a standard would sanction the open use of race as a proxy for politics so long as it is effective. This result is at odds not only with all of the Court's racial gerrymandering precedent but also with the core tenet of the Equal Protection Clause.

IV. An Alternative Plan Is Unnecessary Where, As Here, Direct Evidence Establishes The Predominance Of Race In Redistricting.

Appellants attempt to support their position by arguing that this Court's opinion in *Easley v. Cromartie* requires all "*Shaw* plaintiffs [to] produce an alternative plan that 'at the least' achieves the legislature's 'legitimate political objectives' and 'traditional districting principles' while bringing about 'significantly greater racial balance' than the challenged district." Appellants' Br. at 27 (quoting *Easley*, 532 U.S. at 258). This is just another way of demanding that there be a conflict between race and politics for a *Shaw* claim to succeed. But *Easley* does not require an alternative plan in cases, such as this, where there is direct evidence of racial discrimination. In arguing otherwise, Appellants distort an evidentiary rule useful in cases premised on circumstantial evidence, and attempt to transform it into a legal element of all *Shaw* claims.

Since the sort of "[o]utright admissions of impermissible racial motivation" that occurred here "are infrequent," *Hunt*, 526 U.S. at 553, this Court has developed a jurisprudence focused on how *Shaw* plaintiffs can prove their claims through circumstantial evidence. In particular, *Hunt* and *Easley* address how courts should resolve racial gerrymandering cases

based primarily on circumstantial evidence that "tend[s] to support both a political and racial hypothesis" due to the strong correlation between race and political affiliation. *Hunt*, 526 U.S. at 550; *see also id.* at 547 ("Appellees offered only circumstantial evidence in support of their claim."); *Easley*, 532 U.S. at 253-54 (finding the minor direct evidence insufficient and looking to circumstantial evidence of predominance).

In this subset of cases, where no direct evidence establishes the predominance of race, and race and party are highly correlated, an obvious factual issue arises as to which factor predominated. Thus, the Court has held that plaintiffs *in these cases* can overcome this factual barrier by providing an alternative plan that achieves the asserted political objectives with greater racial balance. *Easley* 532 U.S. at 258 (requiring an alternative plan "[i]n a case *such as this one* . . . where racial identification correlates highly with political affiliation" (emphasis added)).

The Court's concern in *Easley* was evidentiary. *Id.* at 241 ("The issue in this case is evidentiary."). In light of the strong correlation between race and party, where direct evidence of racial discrimination is lacking, a *Shaw* plaintiff must put forth some evidence that race rather than party provided the basis for the district, in order to dispel the equally plausible partisan explanation. Such evidence is established by showing an alternative plan revealing a conflict between racial and partisan motivations. The *Easley* rule makes perfect sense in its proper context as an evidentiary requirement to ferret out racial rather than political

motives in circumstantial cases. However, this evidentiary concern is absent in cases, such as this one, where direct evidence already establishes that race was the predominant factor in the creation of a district. *Easley* does not stand for the proposition that once plaintiffs have met their burden of proving racial intent, they must additionally disprove all other potential post-hoc explanations for the result.

Appellants' insistence on an alternative map as an element of a *Shaw* claim mirrors the flawed argument rejected by this Court in *Miller*. There, the district court found that race was the predominant factor in drawing a district based on direct evidence of intent. 515 U.S. at 910-11. Nonetheless, the appellants argued that "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race." *Id.* at 910. This Court correctly rejected the argument, which sought to transform the bizarre shape evidentiary holding in *Shaw* into an element of a racial gerrymandering claim: "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake . . . was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913. Likewise, the alternative plan identified in *Easley* is relevant not because it is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it offers pivotal evidence when circumstantial evidence raises a factual issue as to whether race rather than politics motivated the district lines.

Ultimately, Appellants' position that *Easley* imposes an alternative plan requirement upon all *Shaw* plaintiffs is simply a reformulation of their erroneous predominance analysis. Appellants' would have this Court demand a conflict between race and other redistricting principles, not simply as an evidentiary tool to disaggregate race and party in ambiguous cases, but rather as a means to override clear evidence of racial intent. Just as it should reject Appellants' flawed predominance standard, the Court should also decline to adopt Appellants' unnecessarily broad application of *Easley*'s alternative plan requirement.

CONCLUSION

For the foregoing reasons, the decision of the three-judge court should be affirmed.

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Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. *MILLER* AND *ALABAMA* PROVIDE CLEAR AND ENFORCEABLE STANDARDS FOR THIS CASE 6

II. *MILLER* AND *ALABAMA* PROVIDE ADEQUATE GUIDANCE TO STATE LEGISLATURES AND DISTRICT COURTS 14

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE THIRD CONGRESSIONAL DISTRICT WAS SUBJECT TO STRICT SCRUTINY UNDER *MILLER* 16

A. The Evidence Shows Subordination of Traditional Districting Principles 16

B. The District Court's Finding that Race Rather than Politics Predominated was Supported by Substantial Evidence and Was Not Clearly Erroneous 20

CONCLUSION 23

APPENDIX A

Map of Virginia's Third Congressional District ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Johnson, 521 U.S. 74 (1997) 11

Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) ..... *passim*

Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) 1

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 8, 9

Bartlett v. Strickland, 556 U.S. 1 (2009) 1

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

City of Mobile v. Bolden, 446 U.S. 55 (1980) 2

Clark v. Roemer, 500 U.S. 646 (1991) 1

Clinton v. Smith, 488 U.S. 988 (1988) 1

Connor v. Finch, 431 U.S. 407 (1977) 1

Easley v. Cromartie, 532 U.S. 234 (2001) ..... *passim*

Karcher v. Daggett, 462 U.S. 725 (1983) 17

King v. Illinois State Bd. of Elections, 522 U.S. 1087 (1998) 12

LULAC v. Perry, 548 U.S. 399 (2006) 15

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Northwest Austin Municipal Utility District No. 1 v. Holder, 557 U.S. 193 (2009) 1

TABLE OF AUTHORITIES – Continued

Page

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) 1

Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004) 15

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Shelby County v. Holder, 133 S. Ct. 2612 (2013) 1

Thornburg v. Gingles, 478 U.S. 30 (1986) 2

United States v. Hays, 515 U.S. 737 (1995) 11

Wittman v. Personhuballah, (2015) (No. 14-1504) 22

Young v. Fordice, 520 U.S. 273 (1997) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 6, 8

STATUTES

52 U.S.C. § 10301(c) 2, 15

STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw*

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of *amicus* briefs, and these letters are on file with the Clerk.

v. Reno, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

SUMMARY OF ARGUMENT

Substantial evidence amply supports the District Court's finding that Virginia's Third Congressional District was the product of a racial gerrymander in violation of *Shaw v. Reno*, 509 U.S. 630 (1993), and represented the misuse of federal civil rights protections, specifically Section 5 of the Voting Rights Act, 52 U.S.C. § 10301(c). The legal framework set forth in *Miller v. Johnson*, 515 U.S. 900 (1995), and *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), calls for affirmance of the District Court's conclusions that racial considerations were the Legislature's predominant concerns in creating the Third Congressional District triggering strict scrutiny, and that the design of the Third Congressional District did not withstand strict scrutiny because it was not narrowly tailored to achieve compliance with Section 5 of the Voting Rights Act.

This case requires only a straightforward application of *Miller* and *Alabama* to the facts and demonstrates that the Court's framework established in those cases remains clear and workable. The fact that members of the Virginia General Assembly charged

with redistricting announced a target of 55 percent for the African American share of the voting age population in redrawn District 3 is relevant but not conclusive evidence with respect to the threshold question of whether District 3 should be subject to strict scrutiny, as the district court correctly concluded.

Under the *Miller* and *Alabama* framework, redistricting plans that subordinate traditional districting principles in favor of racial considerations are subject to strict scrutiny. Evidence that traditional districting principles were subordinated is drawn first from an objective review of the challenged district's shape, compactness, contiguity, and demographic makeup. Courts may further consider evidence of legislative purpose, such as statements in the legislative record and post hoc testimony, in order to assess the extent to which the disregard for traditional districting principles is causally related to racial considerations.

The objective, geographic and demographic evidence before the District Court overwhelmingly showed that race was the predominant consideration contributing to the "odd shape" of the Third Congressional District. This evidence included the "disparate chain" of predominantly African American communities "loosely connected" by the James River but not contiguous by land; the undisputed fact that the District was the least "compact" Congressional District in Virginia; and the conspicuous lack of respect for political subdivision boundaries shown by splitting nine counties or cities. This objective evidence,

together with various statements by the legislation's sole author that race was "nonnegotiable," the "primary focus" and "one of the paramount concerns" in drawing the Third Congressional District was to avoid "retrogression," demonstrated that the contortions of District 3 were not just the product of ordinary partisan concerns, and led the District Court to the inescapable conclusion that race was *the* predominant factor behind the Third Congressional District's design, achieved by subordinating traditional race-neutral districting principles.

The ample objective, geographic evidence of racial gerrymandering here makes it unnecessary for the Court to reach the question left open in *Alabama* of whether a legislature's decision to set a minority population target when redistricting by itself triggers strict scrutiny. *See Alabama*, 135 S. Ct. at 1272. This Court has *never* applied strict scrutiny solely based upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama*, 135 S. Ct. at 1272 (citing *Bush v. Vera*, 517 U.S. 952, 996 (1996)); *Shaw*, 509 U.S. at 649.

This is consistent with the Court's jurisprudence distinguishing election districts that are racial classifications, from those that show only routine legislative considerations, because an election district's minority percentage is not mathematical evidence that its boundaries are distorted by racial considerations. Rather, it is the *implementation* of the State's racial target policy, and not that the State had targets

ab initio, that ultimately determines whether particular districts are racial classifications. The operative factors that may trigger strict scrutiny, either individually or collectively, are whether a given district exhibits widely dispersed pockets of minority populations, highly irregular district boundaries, and/or extensive splits of political units. *See id.* at 645 (12th Congressional District in North Carolina). However, the mere fact that a state set a population target for a district is not a basis for subjecting that district to strict scrutiny, if the challenged district does not offend traditional districting principles, *i.e.*, so long as the district unites a reasonably compact and contiguous minority population along local political boundaries, and the district is not dramatically irregular in its overall shape. It is the subordination of traditional districting principles, causally linked to racial considerations, which the Court subjects to strict scrutiny. There is no reason to conclude that establishing specific numerical targets is *per se* incompatible with traditional districting principles or that the resulting plan will suffer in any way.

This Court's precedents in *Miller* and *Alabama* provide an effective framework for analyzing the facts in this case, and the District Court's factual findings are fully supported by this record. Accordingly, the District Court's decision should be affirmed under the existing *Miller* and *Alabama* framework.

ARGUMENT

I. *MILLER* AND *ALABAMA* PROVIDE CLEAR AND ENFORCEABLE STANDARDS FOR THIS CASE

This Court has repeatedly recognized that the framework first announced in *Miller v. Johnson*, 515 U.S. 900 (1995) is the touchstone for determining when state electoral districting plans trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Alabama Legislative Black Caucus*, 135 S. Ct. at 1264; *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) ("*Cromartie II*"); *Vera*, 517 U.S. at 958. This framework remains a viable and effective standard for enforcing the Fourteenth Amendment's guarantee against racial discrimination in the realm of redistricting, and this Court need not depart from it.

The Equal Protection Clause prohibits states from classifying citizens by race, including adopting electoral redistricting schemes based on racial characteristics without adequate justification. *See Shaw*, 509 U.S. at 645. To demonstrate that a district violates the Equal Protection Clause, a plaintiff must first show that race was the predominant factor in how the legislature drew district lines. *Miller*, 515 U.S. at 915. If a plaintiff makes this showing, the Court then employs its "strictest scrutiny" to determine whether the redistricting plan was narrowly tailored to further a compelling state interest. *Id.*

In determining whether racial considerations predominated, the constitutional inquiry begins with an objective spatial analysis of the district and its minority population. The analysis includes considering the compactness and dispersal of the minority population within a district, such as whether it is connected by artifices such as land bridges or relies on point contiguity that would not normally be employed. *See Shaw*, 509 U.S. at 646; *Miller*, 515 U.S. at 917. The analysis also includes looking for patterns of racially-correlated splitting of political units that are normally kept intact. *See Bush*, 517 U.S. at 974. In short, the analysis begins by determining whether the geography of the challenged district appears to be a racially-identifiable departure from what would normally be expected from a compact and contiguous district, and whether something has distorted the district's configuration along racial lines.

The analysis starts with these objective factors because "reapportionment is one area in which appearances do matter." *Shaw*, 509 U.S. at 647. In some cases, this objective inquiry is enough to demonstrate that a state engaged in an unlawful racial gerrymander. *See id.* at 646-47 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). In many cases, however, the analysis requires looking into the legislative process to see if racial considerations are responsible for the district's configuration. This inquiry searches for any contemporaneous statements of legislative purpose and post hoc testimony suggesting that race played

an undue role in districting decisions. *See Miller*, 515 U.S. at 917-18.

The structure of the *Miller/Alabama* test is faithful to this Court's general framework for discerning when facially neutral laws have a discriminatory purpose in violation of the Fourteenth Amendment. *See Shaw*, 509 U.S. at 643 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) ("*Arlington Heights*")). When searching for an invidious discriminatory purpose, "[t]he impact of the official action – whether it 'bears more heavily on one race than another[ ]' . . . – may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). After analyzing the objective impact of a law, courts consider other evidence, including "legislative or administrative history . . . especially . . . contemporary statements by members of the decision making body." *Arlington Heights*, 429 U.S. at 268. Therefore, inquiries into whether a facially-neutral state action – redistricting or otherwise – was motivated by unjustified racial considerations begin with an objective analysis before probing the legislative record for indicia of improper purpose.

Accordingly, courts "do not view any of [*Miller*'s] factors in isolation." J.S. App. at 16a.[2] On their own, statements of supposed legislative purpose and post hoc

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[2] "J.S. App." refers to the Appendix attached to the Appellants' Jurisdictional Statement.

testimony about the legislative process neither prove nor disprove whether traditional districting principles – like compactness, contiguity, and respect for political subdivisions – were improperly subordinated to racial considerations. In addition, contemporaneous legislative statements are often self-serving and disingenuous, and obtaining post hoc evidence may be difficult. *See Arlington Heights*, 429 U.S. at 268. However, when coupled with other evidence that traditional districting principles were disregarded, legislative statements and post hoc testimony can illuminate whether traditional districting principles were compromised for racial reasons.

Evidence that a state set a minority population target for a district may be one consideration in finding that race was causally related to a departure from traditional districting principles. But it would short-circuit *Miller*'s carefully constructed analytical framework to treat a population target as a racial classification *per se*. When a state professes to target a majority-minority district generally (a district with a 50 percent or greater minority population) or a specific percentage (as in this case), there is no reason to conclude that those goals are incompatible with traditional districting principles or that the resulting plan will suffer in any way. *See Shaw*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

An election district's minority percentage is not mathematical evidence of racially driven distortions of district boundaries. Reaching a 40 percent minority target might require extensive geographic contrivances in one region, whereas in another region a 60 percent minority district could be the natural result of following traditional districting principles to the letter. In other regions, a state might have to violate traditional districting principles in order to *prevent* the creation of a 75 percent minority district. Needless to say, a district with a 70 percent minority population does not necessarily involve twice the racially driven boundary manipulations of a 35 percent minority district; neither figure in and of itself indicates that any unusual boundary manipulations occurred.

When adhering to the bounds of traditional districting criteria, some districts may be majority-black and others majority-white, but for constitutional purposes they are just districts. There is no constitutional basis to deem majority-white election districts as normative, or to presuppose that majority-minority election districts deviate from the norm. Such a rule would abandon this Court's understanding of equal protection because it would create explicitly different rules for black and white citizens.

During the redistricting process, any state with a sizable minority population will assuredly be aware of the racial consequences of its boundary changes, particularly where the racial composition of its districts has a predictable and substantial electoral

impact. *See Miller*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."). It is simply unrealistic to expect that prohibiting states from acknowledging racial compositions in their redistricting decisions will prevent states from ever being aware of the racial impact of these decisions. Because states will unavoidably be aware of this impact, treating evidence of population targets as a *per se* racial classification would ultimately lead states to rely even more upon subterfuge and opacity in the redistricting process.

This Court never has applied strict scrutiny solely upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama Legislative Black Caucus*, 135 S. Ct. at 1272 (citing *Vera*, 517 U.S. at 996); *Shaw*, 509 U.S. at 649. Rather, strict scrutiny may be triggered by individual or collective objective facts such as whether the district exhibits widely dispersed pockets of minority population, highly irregular district boundaries, and extensive splits of political units. *See Shaw*, 509 U.S. at 645 (12th Congressional District in North Carolina); *Shaw*, 517 U.S. 899 (1996) (same); *Cromartie II*, 532 U.S. 234 (same); *United States v. Hays*, 515 U.S. 737, 741-42 (1995) (2nd and 4th Congressional Districts in Louisiana); *Miller*, 515 U.S. 900 (11th Congressional District in Georgia); *Abrams v. Johnson*, 521 U.S. 74, 77-78 (1997) (2nd and 11th Congressional Districts in Georgia); *Bush*, 517 U.S. 952 (18th,

29th and 30th Congressional Districts in Texas). *See also King v. Illinois State Bd. of Elections*, 522 U.S. 1087 (1998) (summarily affirming three-judge court decision concerning 4th Congressional District in Illinois).

The *implementation* of the state's target policy, and not the fact that the state had targets *ab initio*, ultimately must determine whether particular districts are racial classifications. That a state set a population target for a district is not a basis for subjecting that district to strict scrutiny if the challenged district does not offend traditional districting principles. For example, a state that sets a 55 percent "target" for a majority-minority district does not trigger strict scrutiny, so long as the district unites a reasonably compact minority population along local political boundaries, and the district is not dramatically irregular in its overall shape.

It is the subordination of traditional districting principles, causally linked to racial considerations, that the Court has subjected to strict scrutiny. *See Miller*, 515 U.S. at 917. The districts that have been subjected to strict scrutiny under *Shaw* had the following common elements: they achieved a majority-minority population percentage by (a) uniting widely-separated minority population concentrations using geographical contrivances such as "land bridges," narrow fingers, wings or other unusually-shaped appendages or connectors that distorted the perimeter of the district, and/or (b) they split numerous political units such as counties, cities or voting precincts in a

racially disparate way. *See Bush*, 517 U.S. at 974; *Miller*, 515 U.S. at 917; *Shaw*, 509 U.S. 630. In no case has this Court held that the goal of creating a majority-minority district *ipso facto* constitutes a racial gerrymander that requires strict scrutiny.

If a population target alone were sufficient to trigger strict scrutiny, this would tend to become an all-inclusive tautology. Because actors are assumed (outside the criminal context) to intend the consequences of their voluntary actions, and multitudes of district configurations are typically available, any district with a sizable minority population could be viewed as having resulted from an attempt to meet a target, regardless of whether it was explicitly identified as such. It would be difficult to identify a principled distinction in this regard between a district drawn with a 35 percent minority population, for example, versus a 45 percent or 55 percent minority population. It cannot be the Court's intent to make every district with a sizable minority population subject to strict scrutiny, a conclusion that would invite endless and unnecessary constitutional litigation over the racial composition of electoral districts. Nor does it make sense to force states to engage in a charade in which they are discouraged from disclosing their genuine redistricting criteria. *Shaw* explicitly acknowledged that officials inevitably are aware of race when they redistrict, and that such awareness is not on its own of constitutional import. *See Shaw*, 509 U.S. at 646 ("[T]he legislature always is *aware* of race when it draws district lines. . . . That sort of race

consciousness does not lead inevitably to impermissible race discrimination.") (emphasis in original).

Here, Virginia legislators identified a particular minority population percentage as a redistricting target for the Third Congressional District, but this alone did not establish that the Legislature subordinated traditional race-neutral districting principles to racial considerations. Rather, it was evidence of the District's odd shape, lack of contiguity, and exceptionally high number of local precinct splits, corroborated by testimony that race was a singular "nonnegotiable" redistricting criterion for the Legislature, that indicated that race predominated over traditional districting principles, as the District Court found. *See* J.S. App. 21a-27a.

The *Miller/Alabama* test strikes a careful balance that furthers the Fourteenth Amendment's guarantee of fair political participation free of unjustified racial classification while adhering to judicial respect for state legislatures undertaking the difficult task of redistricting. This framework remains an effective safeguard of constitutional rights, and this Court need not expand the circumstances under which an electoral district must be subjected to strict scrutiny.

II. *MILLER* AND *ALABAMA* PROVIDE ADEQUATE GUIDANCE TO STATE LEGISLATURES AND DISTRICT COURTS

Not only do the standards set down in *Miller* effectively balance liberty and federalism values, but

state legislatures have also internalized them in their redistricting processes. States have had little trouble following the set of rules laid down by *Miller*. The post-2000 redistricting cycle in fact generated hardly any *Shaw* litigation of note, because states were careful not to redistrict in a way that would run afoul of *Shaw* and *Miller*.

Alabama, 135 S. Ct. 1257, announced last term, was only the second *Shaw* claim that this Court has reviewed on the merits since *Cromartie II*. In *Alabama*, the Court clarified that maintaining population equality across districts is a background constitutional requirement, and not a traditional districting principle for purposes of the *Miller* test. *See id.* at 1270-71. The Court also explained that a racial gerrymandering claim "applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" *Id.* at 1265. While the District Court majority erred in *Alabama*, there is no indication that other district courts have been unable to properly apply the *Miller* factors.

In the original lower court proceedings in *LULAC v. Perry*, 548 U.S. 399 (2006), the District Court evaluated the plaintiffs' *Shaw* claim and found that the challenged district did not constitute a racial gerrymander. *See Session v. Perry*, 298 F. Supp. 2d 451, 513 (E.D. Tex. 2004) (vacated on other grounds). While this Court found that Texas's redistricting plan violated Section 2 of the Voting Rights Act, it did not reverse the District Court's ruling on the plaintiffs' *Shaw* claim. *See LULAC*, 548 U.S. at 442.

No departure from the *Miller/Alabama* test is required in this appeal. When the *Miller/Alabama* test is applied to the District Court's findings, the evidence shows that racial considerations predominated over traditional districting principles. *See infra* § III. Given the paucity of *Shaw* claims arising out of recent redistricting cycles and the relative ease with which lower courts have evaluated such claims, there is no reason for the principles of *Miller* or *Alabama* to be revisited or reformulated.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE THIRD CONGRESSIONAL DISTRICT WAS SUBJECT TO STRICT SCRUTINY UNDER *MILLER*

The District Court correctly found that race was the predominant factor in how the Legislature drew the Third Congressional District. The District Court's review of the evidence regarding the Third Congressional District substantially supported its finding that Virginia subordinated traditional districting principles to racial factors. There is no basis for arguing that the District Court's findings were clearly erroneous.

A. The Evidence Shows Subordination of Traditional Districting Principles.

The District Court analyzed the Third Congressional District under the proper standard, as stated

in *Shaw* and *Miller*. In *Miller*, this Court explained that:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

J.S. App. at 15a (citing *Miller*, 515 U.S. at 916).

Here, a simple glance at the Third Congressional District clearly indicates that it is the product of racial gerrymandering. *See Karcher v. Daggett*, 462 U.S. 725, 762 (1983) (Stevens, J., concurring) ("[a] glance at the [congressional] map shows district configurations well deserving the kind of descriptive adjectives . . . that have traditionally been used to describe acknowledged gerrymanders.") (citation omitted). As the District Court described it, the Third Congressional District has "an odd shape and a composition of a disparate chain of communities, predominantly African American, loosely connected by the James River." J.S. App. at 25a. A deeper analysis of the compactness, contiguity, and the political

subdivisions of the Third Congressional District makes it all too clear that the Virginia Legislature subordinated traditional districting criteria to race.

First, the District Court correctly found that the Third Congressional District was non-compact and "bizarrely shaped." *Id.* at 36a; *see also* Appendix A. The District Court noted that Delegate William Janis, the architect of the redistricting, "'didn't examine compactness scores' when drawing the 2012 congressional maps." J.S. App. at 24a (quoting Pls.' Trial Ex. 14, at 8). Even the defendants' expert agreed that "the three primary statistical procedures used to measure the degree of compactness of a district all indicate that the Third Congressional District is the least compact congressional district in Virginia." *Id.* at 25a (citing Trial Tr. 375:21-24, 376:9-13). As a result, it is essentially undisputed that the Third Congressional District is non-compact. *Id.* ("Defendants acknowledge the irregularity of shape and lack of compactness reflected by the Third Congressional District.")

The absence of contiguity in the Third Congressional District was also largely undisputed. As the District Court correctly observed, the Third Congressional District is contiguous in the legal sense only. *See id.* at 26a ("While the Third Congressional District is not contiguous by land, it is legally contiguous because all segments of the district border the James River."). In reality, the Third Congressional District consists of geographically dispersed African American communities loosely connected by the James River.

This indicates that the Legislature most likely used the James River as a means to bypass white communities to connect predominantly African American populations in Norfolk, Newport News and Hampton with African American populations in the Richmond and Petersburg areas. *See id.* The District Court correctly found that the Legislature's decision to use a legal loophole to create the appearance of contiguity is just further evidence that "the district's boundaries were drawn with a focus on race." *Id.*

Finally, the Third Congressional District divides an excessive number of political subdivisions. As the District Court correctly found, the Third Congressional District splits more local political boundaries and more voting tabulation districts than any other district in Virginia. *Id.* at 27a. As a result of the multitude of splits of political subdivisions, the 2012 Redistricting Plan moved over 180,000 people in and out of the Third Congressional District. Notably, "the populations moved out of the Third Congressional District were predominantly white, while the populations moved into the District were predominantly African American." *Id.* (citing Trial Tr. 87 at 81:21-82:6). Thus, an analysis of the political subdivisions of Virginia provides further circumstantial evidence that the boundaries of the Third Congressional District were drawn as a racial gerrymander.

While these objective geographic factors are substantial evidence that race was the predominant factor motivating the Legislature's redistricting plan, *see Shaw*, 509 U.S. at 646-47 ("[A] reapportionment

plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregat[e] . . . voters on the basis of race") (internal quotation marks omitted), the legislative history in this case only bolsters Appellees' claim. Appellants' statements and the statements of the author of the 2012 Redistricting Plan support the conclusion that race predominated the 2012 Redistricting Plan. *See* J.S. App. at 17a-23a.

The District Court correctly held that there is overwhelming evidence that traditional districting criteria were subordinated to race in this case. *See* J.S. App. at 30a.

B. The District Court's Finding that Race Rather than Politics Predominated was Supported by Substantial Evidence and Was Not Clearly Erroneous.

The Appellees established a prima facie case that traditional districting principles were subordinated to race. Unable to refute this showing, Appellants defended the redistricting plan by contending that it was predominantly motivated by partisan politics, not race. *Id.* ("While Defendants acknowledge the irregularity of shape and lack of compactness reflected by the Third Congressional District, they submit that a desire to protect Republican incumbents explains the District's shape."). The District Court rejected that explanation, finding that "less was done to further the goal of incumbency protection than to

increase the proportion of minorities within the district." *Id.* at 32a. Appellants cannot demonstrate that the District Court's rejection of that explanation was clearly erroneous, especially when Delegate Janis, the "architect" of the 2012 Redistricting Plan, categorically denied under oath that partisan politics was a factor in his plan. Thus, when asked whether politics played a role in the formulation of his plan, Delegate Janis testified: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." J.A. at 456.

Moreover, even if the Appellants had a substantial basis for their contention that this case is a "mixed motive suit," in which a state's conceded goal of "produc[ing] majority-minority districts," was accompanied by "other goals, particularly incumbency protection," that would not immunize the Legislature's districting decisions. *Bush*, 517 U.S. at 959. Race can still be a *predominant* factor in the drawing of a district, without the districting revisions being "purely race-based." *Id.* (emphasis omitted). Indeed, the Supreme Court has observed that "partisan politicking" may often play a role in a state's redistricting process, but the fact "[t]hat the legislature addressed these interests [need] not in any way refute the fact that race was the legislature's predominant consideration." *Shaw II*, 517 U.S. at 907.

Appellants' reliance on *Cromartie II* is misplaced. While the record in this case established that politics was not a factor in the 2012 Redistricting Plan, the

record in *Cromartie II* indicated that partisanship was a driving factor. *See Cromartie II*, 532 U.S. at 242; *see also* J.S. App. at 33a. Appellants also mistakenly rely on *Cromartie II*'s statement that "the undisputed evidence that racial identification is highly correlated with political affiliation in North Carolina," *id.* at 243, somehow prevented the District Court from finding that the Third Congressional District's design was motivated predominantly by race. Thus, Appellants argue that the increase in the Third Congressional District's black voting age population simply mirrored the increase in its Democratic vote share, and reflected a purely partisan motivation. *See* Brief for Appellants at 36, *Wittman v. Personhuballah*, (2015) (No. 14-1504).

Cromartie II did not create a *per se* rule that there can be no finding of racial gerrymandering where a racial minority tends to vote more regularly for one political party or another. *Cromartie II* merely observed that African Americans in North Carolina vote Democratic between 95 percent and 97 percent of the time, and reasoned that, "[a] legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature *may*, by placing reliable Democratic precincts within a district without regard to race, *end up* with a district containing more heavily African American precincts, but the reasons would be political rather than racial." *Id.* at 245 (emphasis added). In other words, by focusing on *partisan* concerns, a state legislature may *incidentally* create a majority-minority district. If that is what the evidence had shown, then the rationale for the

creation of such a district would be political rather than racial. But the extensive record evidence here, particularly the statement of the redistricting's prime architect that he did not take partisan factors into consideration, establishes that race was the predominant consideration, if not the only consideration, in drawing the Third Congressional District.

Substantial evidence supported the District Court's conclusion that the intent behind the 2012 Redistricting Plan in creating the Third Congressional District was *not* predominantly political.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's decision.

Respectfully submitted,

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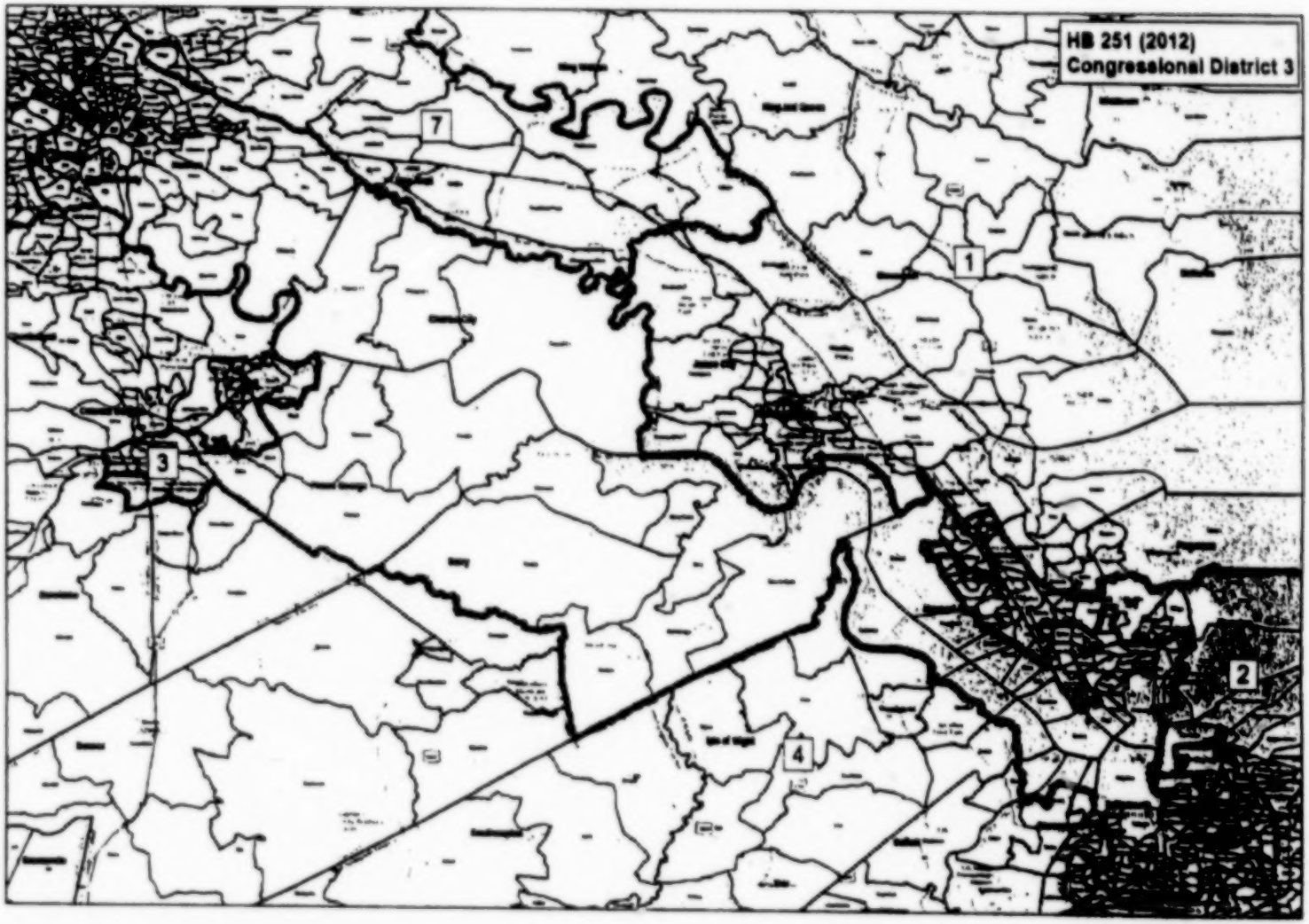
APPENDIX

APPENDIX A



Source: *Current District Maps*, VIRGINIA.GOV, http://redistricting.dls.virginia.gov/2010/Data/2012CongMaps/HB251%20-%20Congress%203.pdf (last visited January 28, 2016).

No. 14-1504

In The
Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal from the
United States District Court
for the Eastern District of Virginia

BRIEF OF ONEVIRGINIA2021 *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

INTEREST OF AMICUS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

PARTISAN GERRYMANDERING, i.e., THE INTENTIONAL MANIPULATION OF DISTRICT LINES TO FIX THE OUTCOME OF CONGRESSIONAL AND STATE LEGISLATIVE ELECTIONS, IS NOT A RATIONAL, LEGITIMATE OR NEUTRAL REDISTRICTING OBJECTIVE, AND MUST NOT BE ALLOWED TO EXPLAIN OR EXCUSE THE VIOLATION OF OTHER CONSTITUTIONALLY MANDATED OR TRADITIONAL GOOD GOVERNMENT REDISTRICTING REQUIREMENTS. 6

CONCLUSION 11

APPENDIX

TABLE OF AUTHORITIES

CASES Page(s)

Anderson v. Bessemer City,
470 U.S. 564 (1985) 3

Arizona State Legislature v. Arizona Independent Redistricting Commission,
576 U.S. ___ (2015) 6

Bush v. Vera,
517 U.S. 952 (1996) 8

Davis v. Bandemer,
478 U.S. 109 (1986) 9

Hunt v. Cromartie,
566 U.S. 541 (1999) 3

Karcher v. Daggett,
462 U.S. 725 (1983) 8

Lawyer v. Department of Justice,
521 U.S. 567 (1997) 3

Page v. Virginia State Board of Elections,
C.A. No. 3:13cv678 (E.D. Va., October 7, 2014)..... 3, 4

Shaw v. Hunt,
571 U.S. 899 (1996) 3

Veith v. Jubelirer,
541 U.S. 267 (2004) 6, 9, 10

OTHER AUTHORITIES

Va. Const. Art. II, Sec. 6..... 3

INTEREST OF *AMICUS*[1]

OneVirginia2021: Virginians for Fair Redistricting, is a nonprofit corporation formed under the laws of the Commonwealth of Virginia and granted exempt status under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code. OneVirginia2021 was organized to initiate a comprehensive effort to remove gerrymandering from the redistricting process in Virginia, through public education, participation in meaningful litigation, and by seeking an amendment to the Constitution of Virginia establishing an impartial Redistricting Commission – independent of the Virginia General Assembly – to draw legislative and congressional district lines. The commission would be required to use specific, objective and well-defined redistricting criteria in performing the redistricting function, to invite public participation in the process and to be fully transparent.

OneVirginia2021 is interested in this case because it presents an opportunity to address the destructive impact of invidious partisan gerrymandering on the fundamental process of determining congressional and legislative representation through redistricting. Moreover, the record in this case allows the Court to clarify that admitting to discrimination against voters based on their political viewpoint can never be accepted as an

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[1] Pursuant to Rule 37.6, *amicus* submitting this brief and its counsel hereby represent that none of the parties in this case nor their counsel authored this brief in whole or in part and that no person other than *amicus* paid for or made a monetary contribution toward its preparation and submission.

adequate defense in equity to an otherwise well-grounded claim of racial discrimination in the redistricting process.

This *amicus* brief is filed in support of the appellees with the consent of all parties. Letters confirming the parties' consent are being filed herewith in accordance with this Court's Rule 37.3(a).

SUMMARY OF ARGUMENT

This case has importance beyond the issue of race in redistricting. The Court's decision likely will determine whether redistricting will ever again serve its purpose of promoting fair and effective representation through the creation of appropriate and rationally based Congressional and legislative districts, or whether the current, widespread practice of unchecked partisan gerrymandering and electoral manipulation to entrench political power will become a judicially sanctioned rule. The question before the Court is simple. Should partisan gerrymandering, i.e., manipulating districts using political data to rig the outcome of Congressional and state legislative elections, be considered a rational, legitimate and neutral redistricting objective, the assertion of which may be offered as a basis for noncompliance with other constitutional, statutory or longstanding traditional redistricting requirements?

The issue comes to this Court with an uncomplicated record. The district court below found that the Virginia General Assembly engaged in unconstitutional racial gerrymandering in drawing the 3rd Congressional district. The district

court's conclusion that race was the predominant factor motivating the Virginia legislature is a factual finding. See *Hunt* v. *Cromartie,* 526 U. S. 541, 549 (1999); *Lawyer* v. *Department of Justice,* 521 U. S. 567, 580 (1997); *Shaw* v. *Hunt,* 517 U. S. 899, 905 (1996). See also *Anderson* v. *Bessemer City,* 470 U. S. 564, 573 (1985) ("[I]ntentional discrimination is a finding of fact . . ."). Accordingly, this Court should not overturn the district court's determination unless it is clearly erroneous. See *Lawyer, supra,* at 580; *Shaw, supra,* at 910. The conclusion that race predominated was evident in the legislature's complete disregard of traditional redistricting criteria, including the requirements of compactness and contiguity mandated by the Constitution of Virginia. See, Va. Const. Art. II, Sec. 6. The district court noted that the 3rd Congressional District is "the least compact and most bizarrely shaped district in the 2012 plan." *Page v. Virginia State Board of Elections*, C.A. No. 3:13cv678 (E.D. Va., October 7, 2014) (Slip op. at 36). The legislature did not examine compactness scores in creating the district, and a visual test shows it is "well-deserving the kind of descriptive adjectives. . . that have traditionally been used to describe acknowledged gerrymanders." Page, *supra,* (slip op. at 24). (See Map of 3rd Congressional District attached as Appendix I). Moreover, the 3rd Congressional District is not contiguous. It hops across and then back over the James River, stretching water contiguity to ridiculous lengths, and includes precincts in Newport News and Hampton that are completely separated from one another by the 2nd Congressional District.

Racial gerrymandering also was apparent in the wholesale race-based splitting of political subdivisions and voting precincts in the 3rd District - more than any other district. And as the district court noted, "the 2012 plan was not informed by a racial bloc voting or other, similar type of analysis." *Page, supra* at 10. Instead, the General Assembly adopted a minimum racial threshold of 55% black voting age population (VAP) for any minority district, because race was the legislature's "paramount concern" in adopting the 3rd Congressional District. Delegate Bill Janis, the author of the plan, stated on the record that "the primary focus of how the lines were drawn. . . was to ensure that there be no retrogression in the 3rd Congressional District," and that this was "nonnegotiable."

Against this overwhelming record, Appellants now argue in this Court that it was not race that motivated the legislature's actions. Instead, they aver that partisan manipulation was the driving force behind the shape and content of the district in question. Appellants contend that the map was a "political gerrymander," an exercise in "incumbency protection" intended to preserve the "8 to 3 partisan division" in favor of Republicans in the Virginia Congressional delegation. Incumbency protection, however, has never been deemed to mean guaranteed re-election and lifetime tenure for elected officials. Yet lifetime tenure and uncontested elections are precisely what the Appellants claim the majority party in the Virginia General Assembly intended to legislate through unabashed partisan manipulation. Appellants ask the Court to hold that partisan manipulation is a "neutral"

redistricting principle, and that rigging election results to ensure the re-election of their partisans is a "legitimate political objective."

This cannot be. Partisan gerrymandering is an abuse of legislative power and incompatible with democratic principles. There is no rational justification for such an invidious abuse of power, and this Court should decline to recognize partisan gerrymandering as an acceptable explanation for engaging in constitutionally prohibited racial discrimination or disregarding traditional redistricting principles. The district court held that the 3rd Congressional District was an unconstitutional racial gerrymander. That decision should not be disturbed on the basis of the Appellants' claim now that the 3rd District was actually the product of an intentional partisan gerrymander.

ARGUMENT

PARTISAN GERRYMANDERING, i.e., THE INTENTIONAL MANIPULATION OF DISTRICT LINES USING POLITICAL DATA TO FIX THE OUTCOME OF CONGRESSIONAL AND STATE LEGISLATIVE ELECTIONS, IS NOT A RATIONAL, LEGITIMATE OR NEUTRAL REDISTRICTING OBJECTIVE, AND MUST NOT BE ALLOWED TO EXPLAIN OR EXCUSE A VIOLATION OF OTHER IMPORTANT CONSTITUTIONALY MANDATED OR TRADITIONAL GOOD GOVERNMENT REDISTRICTING REQUIREMENTS.

"'[P]artisan gerrymanders,' this Court has recognized, '[are incompatible] with democratic principles.'" *Arizona State Legislature v. Arizona Independent Redistricting Commission, et al.*, 576 U.S. ___, ___ (2015), *quoting Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (plurality opinion); (KENNEDY, J., concurring in judgment). Partisan gerrymandering is the deliberate manipulation of legislative district boundaries where the sole motivation is to advantage or benefit a particular party or group, or cause disadvantage or harm to an opposing party or group. It is a widespread practice that distorts the electoral process, undermines democracy, and renders legislative elections a meaningless exercise.

- **Partisan Gerrymandering reduces and eliminates competition in elections. Unchallenged incumbents have less incentive to ascertain and represent the interests of their constituents.**

- **Partisan Gerrymandering promotes tunnel vision and polarization. Compromise is impeded resulting in greater gridlock in government.**

- **Partisan Gerrymandering increases voter apathy and confusion, and reduces voter participation – why bother to vote when the outcome is preordained? Or when it is difficult to find the correct polling place because of split precincts and localities?**

The effectiveness of the majority party's electoral manipulation through partisan gerrymandering, and the harm imposed on our representative democracy, can be seen in the results of the most recent November 2015 general elections. All 100 seats in the Virginia House of Delegates and all 40 seats in the Senate of Virginia were on the ballot during the last election. Information taken from the Virginia Department of Elections website[2] reveals that of the 100 races in the House of Delegates, 62 delegates ran unopposed. Voters in

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[2] Voter turnout statistics are available here: http://elections.virginia.gov/resultsreports/registration-statistics/registrationturnout-statistics/ . District by district contests and results are here: http://results.elections.virginia.gov/vaelections/2015%20November%20General/Site/GeneralAssembly.html

these districts had no choice whatsoever. In an additional nine races, there was only token third party opposition, for a total of 71 essentially uncontested races. Moreover, after retirements, resignations to run for other office, and three primary contest changes, 128 incumbents sought re-election in the House and Senate on the November ballot. Every one of those 128 incumbents won re-election, most with double figure margins of victory. And Virginia suffered one of the lowest voter turnouts on record, with only 29.1% of registered voters going to the polls. Voter apathy and disinterest have reached record levels.

Against this backdrop of electoral harm, it is especially disturbing that Appellants throughout their brief repeatedly refer to partisan gerrymandering as "incumbency protection," and describe it as a "neutral" and "legitimate" redistricting practice. This is misrepresentation on two grounds. First, incumbency protection has never been construed to mean that districts may be drawn by manipulating electoral outcomes with the goal of ensuring the same politicians will be elected and re-elected year after year. At best, incumbency protection means that map makers should not deliberately draw incumbents out of their districts or pair two or more incumbents together in one district in order to eliminate one of them altogether. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740 ___ (1983) ("Any number of consistently applied legislative policies" can qualify as a rational state policy in this context, "including, for instance, making districts compact, respecting municipal boundaries, preserving cores of prior districts, and avoiding contests between incumbents."). *See also Bush v.*

Vera, 517 U.S. 952 (1996) ("And we have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbents,' as a legitimate state goal."). Contrary to Appellants' argument, incumbency protection was never intended to guarantee re-election or provide tenure for an elected representative.

Second, the Appellants' arguments push the envelope and take partisan manipulation to its extreme. If the legislature, as Appellants argue here, acts in an excessively partisan manner to fix election outcomes by manipulating voting populations through district line drawing, it cannot be said to have acted in a permissible or lawful manner. As Justice Kennedy observed in *Vieth v. Jubelirer*, *supra* at 267 (2004) (KENNEDY, J., concurring in the judgment):

> Finally, I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed the plurality seems to acknowledge it is not. See *ante*, at 292. ("We do not disagree with [the] judgment" that "partisan gerrymanders [are incompatible] with democratic principles") ; *ante*, at 293 (noting that it is the case, and that the plurality opinion assumes it to be the case, that "an *excessive* injection of politics [in districting] is *unlawful*").

541 U.S. at 316. This is not a case, like *Davis v. Bandemer*, 478 U.S. 109 (1986) or *Vieth v. Jubelirer*, *supra*, where the Court must cobble together circumstantial evidence of intentional political discrimination and disparate impact in order to

ascertain a justiciable claim. This case is thick with direct proof of intentional political discrimination and disparate electoral impact, all of which is conclusively established in the testimony of the legislators at trial and the arguments of Appellants in the court below and in this Court now. When legislators assert, as is claimed here, that partisanship was the primary motivation is establishing legislative districts, the body cannot be said to have acted legitimately or rationally. Such assertions should not be allowed to explain or justify unconstitutional racial discrimination and the disregard of well-settled traditional redistricting criteria.

While this Court has struggled with the difficult question of how exactly to adjudicate partisan gerrymandering claims, a majority of the Court has clearly recognized that discrimination based on political affiliation presents a justiciable constitutional harm. *See Veith v. Jubelirer, supra* at 316 (KENNEDY, J., concurring in the judgment). *Amicus* does not ask the Court to settle on a standard and find that such harm is present in this case, but rather to clarify that openly admitting to invidious partisan discrimination cannot provide a safe harbor to a legislature that has disregarded state constitutionally mandated traditional redistricting criteria, like compactness and contiguity, and other traditional good government considerations, in order to implement a "nonnegotiable" 55% racial threshold.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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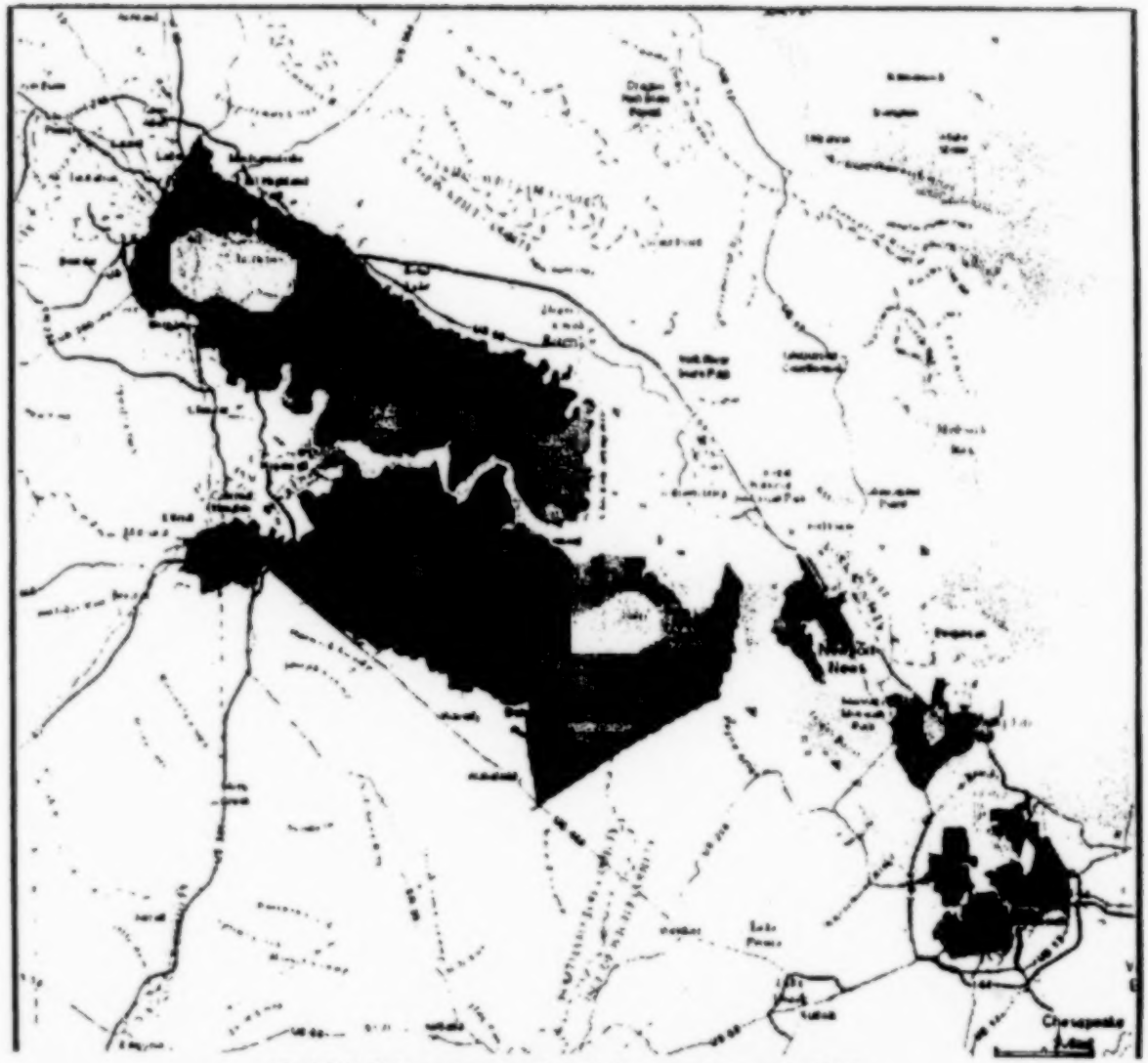

Virginia's 3rd congressional district - since January 3, 2013

No. 14-1504

In The
Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMBSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

AMICUS CURIAE BRIEF OF THE VIRGINIA STATE CONFERENCE OF THE NAACP IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. Applicants Lack Standing to Pursue this Appeal 7

II. Race Predominated in the Drawing of Congressional District 3 11

III. Congressional District 3 Fails Strict Scrutiny Review 16

a. Section 5, Properly Interpreted, Does Not Compel Congressional District 3 as Drawn 16

b. Congressional District 3 Was Not Narrowly Tailored to Advance a Compelling Governmental Interest 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995) 4

Ala. Legislative Black Caucus v. Alabama,
575 U.S. ___, 135 S. Ct. 1257 (2015).....*passim*

Burdick v. Takushi,
927 F.2d 469 (9th Cir. 1991), *aff'd*,
504 U.S. 428 (1992) 9

Bush v. Vera,
517 U.S. 952 (1996) .....*passim*

Easley v. Cromartie,
532 U.S. 234 (2001) 7, 14, 15, 16

Fisher v. Univ. of Tex.,
570 U.S. ___, 133 S. Ct. 2411 (2013).....19

Giles v. Ashcroft,
193 F. Supp. 2d 258 (D.D.C. 2002) 9

Grutter v. Bollinger,
539 U.S. 306 (2003) 21, 22

Hollingsworth v. Perry,
570 U.S. ___, 133 S. Ct. 2652 (2013).....7, 8

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 8, 9

Miller v. Johnson,
515 U.S. 900 (1995) 11, 14, 17, 18

Nw. Austin Mun. Dist. No. 1 v. Holder,
557 U.S. 193 (2009) 5

Page v. Va. State Bd. of Elections
No. 3:13-cv-00678,
2015 U.S. Dist. LEXIS 73514
(E.D. Va. June 5, 2015) ("*Page II*") .....*passim*

Page v. Va. State Bd. of Elections,
58 F. Supp. 3d 533 (E.D. Va. 2014),
vacated sub nom.
Cantor v. Personhuballah,
135 S. Ct. 1699 (2015) ("*Page I*")..... 7

Parents Involved in Cmty. Sch. v.
Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 4

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 19

Shaw v. Hunt,
517 U.S. 899 (1996) 14, 20, 21

Shaw v. Reno,
509 U.S. 630 (1993) 4, 6

Shelby Co. v. Holder,
570 U.S. ___, 133 S. Ct. 2612 (2013)..... 5

Sinkfield v. Kelley,
531 U.S. 28 (2000) 10

United States v. Hays,
515 U.S. 737 (1995) 10

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV 7, 24

U.S. CONST. art. III 8

Va. Const. art. II, § 6 23

STATUTE

42 U.S.C. § 1973c 4

REGULATION

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 27 Fed. Reg. 76 (Feb. 9, 2011) 22

OTHER AUTHORITY

Scott Cast in Sweeping Role, RICHMOND TIMES-DISPATCH, Nov. 2, 1992 3

BRIEF OF VIRGINIA NAACP AS *AMICUS CURIAE* SUPPORTING APPELLEES

This brief is submitted on behalf of the Virginia State Conference of the National Association for the Advancement of Colored People ("Virginia NAACP") as *amicus curiae* in support of Appellees.[1]

INTEREST OF *AMICUS CURIAE*

The National Association for the Advancement of Colored People is one of the oldest and largest civil rights organizations in the United States. The Virginia NAACP, headquartered in Richmond, is a non-partisan, non-profit membership organization with more than one hundred active branches and approximately 16,000 members throughout the Commonwealth of Virginia. It has a number of branches in Congressional District 3 as enacted in 2012, including in Richmond, Petersburg, Norfolk and Virginia Beach. One of the priorities of the Virginia NAACP is to advance and defend the voting rights of its members, including the right to be free from racial discrimination in voting and to elect candidates of their choice at every political level. To that end, the Virginia NAACP has engaged in a variety of public education and community outreach activities to help assure that minority

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

voters have an equal opportunity to participate in the election process.

Additionally, the Virginia NAACP has regularly engaged in litigation in Virginia state courts and in the Fourth Circuit to challenge congressional and legislative redistricting plans that dilute minority voting strength or improperly classify voters on the basis of race. Most recently, in May 2015, the Virginia NAACP sought limited intervention as a plaintiff in the remedy stage of this case. *Page v. Va. State Bd. of Elections*, No. 3:13-cv-00678, ECF No. 157 (E.D. Va. May 5, 2015) (Motion to Intervene). The Virginia NAACP sought this narrowly-proscribed participation because its members who live in Congressional District 3 and in adjacent districts were harmed by being assigned to a congressional district based on the color of their skin. These voters would further be affected by any remedy adopted to cure the constitutional defect in Congressional District 3 and have a position on how the District should be redrawn. *Amicus* sought to ensure that the voices of African-American voters contributed to the development of a constitutional remedy, and that those voices were heard in any subsequent disagreement over the remedy entered. ECF 158 at 6-8 (E.D. Va. May 5, 2015) (Memorandum in Support of Motion to Intervene).

A single judge—Judge Payne, the dissenting judge below—denied the Virginia NAACP's motion to intervene. ECF 169 (E.D. Va. May 26, 2015). That order wrongly rejected the Virginia NAACP's contention that it had a legally-cognizable right that would support intervention. *Id.* While the Virginia

NAACP was allowed, along with other organizations and members of the public, to submit proposed remedial plans, ECF 227 (E.D. Va. Sept. 18, 2015) (Brief in Support of Virginia NAACP's Proposed Congressional Redistricting Plan), Judge Payne's erroneous decision still limits the Virginia NAACP's ability to participate as a party in the briefing of this appeal. Despite that limitation, the Virginia NAACP, comprised of thousands of voters directly impacted by the Commonwealth's racial classification system, has a perspective on the merits of this case that will assist the Court in its analysis.

SUMMARY OF THE ARGUMENT

Virginia's Third Congressional District was first created as a majority African-American district in 1991. *Page v. Va. State Bd. of Elections* No. 3:13-cv-00678, 2015 U.S. Dist. LEXIS 73514, *9 (E.D. Va. June 5, 2015) ("*Page II*"). At that point, no African American had been elected to Congress from the Commonwealth of Virginia since Reconstruction. *See Scott Cast in Sweeping Role*, RICHMOND TIMES-DISPATCH, Nov. 2, 1992, at B5. The district worked as designed, and in 1992, Bobby Scott became the first African American elected to Congress from Virginia in over a hundred years. *Id.* In the twenty years since its creation, African-American voters in the Third Congressional District have, without fail, continued to elect their candidate of choice to Congress. Despite that progress, white incumbent Congresspersons who do not live in the district at issue here and who do not have standing to pursue this appeal, seek to undo that progress and

freeze Virginia in history. This appeal must be dismissed for lack of jurisdiction.

In understanding the crux of the dispute here, though, it is important to note that in the face of evolving and sometimes subtle racial discrimination in voting, the Voting Rights Act of 1965, particularly Section 5, 42 U.S.C. 1973c, played a critical role in ensuring that minority voters both obtain and retain their ability to elect their candidates of choice. But such remedial legislation must be employed with care—while it is necessary to protect against legislative acts that would infringe upon the right to vote of racial or ethnic minorities, the government must also take care not to reinforce racial stereotypes that undermine this nation's progress toward racial equality and coalition-building. *Shaw v. Reno*, 509 U.S. 630, 648 (1993) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.") (internal quotations omitted). This balancing act is not unique to the redistricting realm. Such care is required in countless legislative arenas, including employment and education, among others. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

The care required to avoid over-reliance on race in the redistricting process is even more

important where, as this Court has noted, "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Shelby Co. v. Holder*, 570 U.S. ___, 133 S. Ct. 2612, 2621 (2013); *see also, Nw. Austin Mun. Dist. No. 1 v. Holder*, 557 U.S. 193, 202 (2009). This Court further noted that "[t]hose conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that '[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." *Shelby Co.*, 133 S. Ct. at 2625.

In addition to emphasizing the changes in the political landscape across that South that might lessen the need for race-based remedies, this Court has also recently reaffirmed its decades-long commitment to using race only narrowly and as needed in the redistricting process. *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257 (2015) ("*ALBC*"). This Court rejected Alabama's use of a mechanical racial target in drawing legislative districts. *Id.* at 1267. Alabama claimed that in order to have its state legislative redistricting plans precleared, it had to maintain the same black voting age percentage in each district in which black voters had the ability to elect its candidate of choice. *Id.* at 1263. This Court also rejected the argument that a plan that uses "race

predominately to maintain the black population" at some fixed number in a district could ever be narrowly tailored to advancing a compelling state interest. *Id.* at 1273. This fixed and unnecessary focus on race was precisely the erroneous understanding of the Voting Rights Act that marred the 2011-2012 congressional redistricting process in Virginia, and rendered Congressional District 3 unconstitutional. *Page II*, 2015 U.S. Dist. LEXIS 73514, *23-31.

Black voters in parts of Virginia, particularly in the Norfolk and Virginia Beach areas, have made incredible progress in recent decades in building cross-racial coalitions and in electing the candidate of their choice—Congressman Bobby Scott—to national office. Rather than recognizing this progress, and drawing Congressional District 3 in as race-neutral a manner as possible, the General Assembly increased the black voting age population in the district from 53.1% to 56.3%. *Page II*, 2015 U.S. Dist. LEXIS 73514, *12. By moving white voters out of the district and black voters into the district, the legislature classified voters by race and made uninformed, harmful assumptions about the representational preferences of voters. This unjustified and offensive packing strategy also limited the ability of black voters to participate in and influence elections in surrounding districts, creating a system reminiscent of political apartheid. *Shaw*, 509 U.S. at 647. Instead of heeding the directives of this Court, what the Virginia General Assembly created in 2012 was "a gerrymander that (*e.g.*, when the State adds more minority voters than needed for a minority group to elect a candidate of

its choice) might, among other things, harm the very minority voters that Acts such as the Voting Rights Act sought to help." *ALBC*, 135 S. Ct. at 1263.

A federal court twice found that the 2012-enacted Congressional District 3 was a racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment. *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 555 (E.D. Va. 2014), *vacated sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015) ("*Page I*"); *Page II*, 2015 U.S. Dist. LEXIS 73514, *58. On the basis of the substantial record before it, and following this Court's guidance in *ALBC*, that court found that race predominated in configuration of the district, and that the use of race was not narrowly tailored to achieving a compelling state interest. *Page II*, 2015 U.S. Dist. LEXIS 73514, *58. That decision must be affirmed absent a finding that the lower court was clearly erroneous. *Easley v. Cromartie*, 532 U.S. 234, 237 (2001) ("*Cromartie II*").

ARGUMENT

I. Applicants Lack Standing to Pursue this Appeal

Federal courts are not constitutionally authorized to settle disputes unless an "actual controversy" between two parties with judicially cognizable interests exists throughout the duration of a case. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). When the constitutionality of a state law such as a redistricting plan is challenged in federal court, it is well settled that "a State has a

cognizable interest 'in the continued enforceability' of its laws" when a court has declared the state law unconstitutional, and that the State therefore has standing to appeal an adverse decision. *Id.* at 2664. The problem arises, however, when a party other than the State intervenes to defend the constitutionality of a law and seeks to appeal an adverse decision even when the State declines to appeal. In those circumstances, the court must decide whether that party has a judicially cognizable interest in continuing the litigation. *Id.* at 2663.

It is well established that a party must prove three elements necessary to satisfy the "case or controversy" requirement of Article III of the Constitution: the party must have suffered an "injury in fact" (an invasion of a legally-protected interest which is "concrete and particularized" and is "actual or imminent, not conjectural or hypothetical"); there must be a "causal connection" between the injury and the conduct complained of; and it must be "likely," and not merely "speculative," that the injury will be redressed by the relief requested. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

As Republican congresspersons who will allegedly have a more difficult time being re-elected if Virginia's racial gerrymander is undone, Appellants claim this gives them standing to defend the 2012 redistricting plan, where the State has chosen not to appeal. Speculative allegations such as the ones made by Appellants in the appeal in this case do not rise to the level of injury required to establish Article III standing. Just as a voter does

not have a right to vote for any particular candidate, *Burdick v. Takushi*, 927 F.2d 469, 473 (9th Cir. 1991), *aff'd*, 504 U.S. 428 (1992), it logically follows that an incumbent office holder has no legally-protected right to run in a safe electoral district. *See, e.g.*, *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 266 n. 6, 268 n. 9 (D.D.C. 2002) ("Giles' assertion that a gerrymandered Second District 'adversely affects the other three districts' in Mississippi does not allege a cognizable injury" and "[a]s a candidate for Congress, Giles also contends that [the challenged plan] burdens his campaign as voters are not aware of which district or precinct they live in, which candidates are running in their district, and to whom they should contribute money. This 'injury' is also insufficient to create standing."). For example, Appellant Forbes complains that under any remedial plan he will face a less certain path to re-election, and he also complains that any remedy of the constitutional violation below requires the shifting of black voters out of Congressional District 3 and into the surrounding districts represented by Republicans. App. Br. at 57-58. But neither of those complaints comes close to being the type of injury that this Court requires in order to wade into the controversy, *Lujan*, 504 U.S. at 562-64, and the latter complaint makes the same offensive, race-based assumptions that condemned Congressional District 3 in the first place. If Republican representatives have standing in the circumstances of this case to object to the addition of black voters to their districts, the domino effects on redistricting litigation and race relations in politics will be immeasurably detrimental.

Indeed, non-state parties defending a racial gerrymandering case ought to be held to the same high standard for proving standing as demanded of plaintiffs who bring racial gerrymandering cases. This Court recently emphasized that standard, noting:

> [o]ur district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally . . . subjected to [a] racial classification," as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim.

ALBC, 135 S. Ct. at 1265 (internal citations omitted). Based on that well established principle, this Court has denied access to judicial relief to litigants who do not live in a challenged district and thus do not have a sufficiently serious injury. *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000); *United States v. Hays*, 515 U.S. 737, 744-45 (1995). The Congresspersons seeking to pursue this appeal should be held to no less a standard. They seek to gain politically from the harms inflicted upon black voters classified and segregated into a district

because they were black. The harm claimed by the intervenor Congresspersons, namely that they may have to appeal to black voters newly added to their district, is not a personal, cognizable harm. Elected officials must represent all of their constituents, regardless of race. As such, the appeal should be dismissed for lack of jurisdiction.

II. Race Predominated in the Drawing of Congressional District 3

This Court's recent decision in *ALBC* leaves little room for doubt that the lower court correctly concluded, after examining all the facts, that Congressional District 3 violates the Equal Protection Clause. Where race is the predominant factor in district line drawing, strict scrutiny must be applied to a court's review of that district. *Miller v. Johnson*, 515 U.S. 900, 905 (1995). Race predominates where race is the "dominant and controlling ... consideration in deciding to place a significant number of voters within or without a particular district." *ALBC*, 135 S. Ct. at 1264. Other factors may play "an important boundary-drawing role," but that does not negate that race factored more than traditional districting criteria into "determining which persons were placed in appropriately apportioned districts. *Id.* at 1271.

A reviewing court can consider both the direct statements of legislators and mapdrawers, and indirect or circumstantial evidence relating to a district's shape and composition, to determine whether race predominated in the district lines. Just like "[t]he legislators in charge of creating the

redistricting plan [in Alabama] believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible," *id.* at 1271, the legislative leader in the instant case testified that drawing Congressional District 3 at the benchmark level was the primary "non-negotiable" goal. *Page II*, 2015 U.S. Dist. LEXIS 73514, *29-30. And while a jurisdiction may not, without being subject to strict scrutiny, use race as a proxy for partisanship, *Bush v. Vera*, 517 U.S. 952, 993 (1996), Appellants' claim that partisanship determined the boundaries of the challenged district is flatly contradicted by the record and the findings of the court below. Indeed, Delegate Janis, the primary legislative proponent of the congressional plan, stated unequivocally: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." *Page II*, 2015 U.S. Dist. LEXIS 73514, *46. These direct statements, much like the ones in *ALBC*, are more than sufficient to conclude that race predominated, but the court below found that indirect evidence also supported that conclusion.

Beyond the direct admissions of decision-makers, the court below also correctly identified several other factors that supported a conclusion that race predominated. *Page II*, 2015 U.S. Dist. LEXIS 73514, *31-49. The court noted that the shape, non-contiguousness, splits in political subdivisions, and population swaps utilized in crafting Congressional District 3 all indicated that traditional districting criteria were subordinated to race. *Id.* at *32-41. As in Alabama, the legislature

here "deliberately chose additional black voters to move into" Congressional District 3, instead of white voters, because of an alleged fear of retrogression. *Id.* at *12, 41; *ALBC*, 135 S. Ct. at 1266.

Appellants argue that preserving the core of the previous districts explains the irregular shape of the district, and that race did not predominate over that traditional redistricting criteria. App. Br. at 3. Following this Court's instruction in *ALBC* that core preservation is "not directly relevant to the origin of the new district inhabitants," 135 S. Ct. at 1271, the court below rejected that argument. The majority noted that:

> [f]ar from attempting to retain most of the Benchmark Plan's residents within the new district borders, the 2012 Plan moved over 180,000 people in and out of the districts surrounding the Third Congressional District to achieve an overall population increase of only 63,976 people. Tellingly, the populations moved out of the Third Congressional District were predominantly white, while the populations moved into the District were predominantly African-American. Moreover, the predominantly white populations moved out of the Third Congressional District totaled nearly 59,000 residents--a number very close to the total required increase of 63,976 people.

Page II, 2015 U.S. Dist. LEXIS 73514, *40-41 (internal citations omitted).

Finally, on the question of race predominating, Appellants are also wrong when they assert that this Court's decision in *Cromartie II* somehow provides a partisanship excuse for racial districting. That is not the case. *Cromartie II* involved racial gerrymandering claims from North Carolina that were in front of the Court for the fourth time, 532 U.S. at 237, and where the legislature had redistricted again in order to cure earlier-identified constitutional defects. *Id.* at 239. The Court said that plaintiffs, in proving that race predominated, would have to demonstrate that the legislature could have achieved its legitimate political objectives in an alternative way comparably consistent with traditional districting principles and that such an alternative would have brought about significantly greater racial balance, *id.* at 258, only "in a case such as this one," i.e., a remedial redistricting process, where plaintiffs did not have

> the kinds of direct evidence we have found significant in other redistricting cases. *See Vera*, *supra*, at 959 (1996) (O'Connor, J., principal opinion) (State conceded that one of its goals was to create a majority-minority district); *Miller*, *supra*, at 907 (State set out to create majority-minority district); *Shaw [v. Hunt*, 517 U.S. 899,] 906 (recounting testimony by Cohen that creating a majority-minority district was the

> "principal reason" for the 1992 version of District 12).

Id. at 254. That is, this Court did not, in *Cromartie II*, overrule its decade-long standard for a racial gerrymander and, more specifically, for proving that race predominated in drawing a particular district. It simply noted that, in a case where there had been remedial action to cure racial gerrymandering and evidence of racial predominance in the remedial plan was lacking, challengers alleging that race still predominated in the remedial district may be required to prove more in order to succeed. Such a situation is not the one faced here.

Another factor that distinguishes *Cromartie II* from the instant case is the splitting of voting tabulation districts (VTDs), more commonly known as precincts, in the formation of the challenged districts. Political data is only collected and produced at the VTD level, not the smaller census block level. *Vera*, 517 U.S. at 961. When a mapdrawer splits a precinct, the only reliable information he has is the Census Bureau's total population and racial demographics. *Id.* The district at issue in *Cromartie II* had very few split precincts—thus, the mapdrawer could have drawn the district based on accurate political data. This is not the case here, where the challenged district splits a large number of precincts, far more than in any other district in the state. In the instant case, 14 out of the 20 split VTDs in the 2012 enacted plan were in Congressional District 3—evidence that race, rather than politics, contributed to the decision about which voters to include and exclude in the

construction of the district. *Page II*, 2015 U.S. Dist. LEXIS 73514, *36-37.

Thus, in *Cromartie II*, there was a real question of whether race or politics predominated. It was given that setting, and where race and politics were highly correlated, that the Supreme Court concluded that proof that race predominated might require proof of an alternate plan that achieved the same partisan goals without the same racial impact. Given the extensive direct admissions that race predominated in this case, absent in *Cromartie II*, Plaintiffs did not need that further element of evidence to prove the predominance of race.

III. Congressional District 3 Fails Strict Scrutiny Review

a. Section 5, Properly Interpreted, Does Not Compel Congressional District 3 as Drawn

A plan that goes beyond that which is required by Section 5 would have certainly ensured preclearance, but that is not the strict scrutiny question that the Supreme Court has applied when determining whether there is a compelling government interest in complying with Section 5.

The Supreme Court has held that as compared to Section 2 of the VRA, Section 5 has a limited substantive goal: to ensure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities

with respect to their effective exercise of the electoral franchise. *Vera*, 517 U.S. at 982-83.

Just last year, this Court reaffirmed that compliance with Section 5 does not require a jurisdiction to maintain, let alone increase, the black voting age population in a district. The Court unequivocally stated that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage." *ALBC*, 135 S. Ct. at 1272. Although the *ALBC* decision post-dated the 2011 redistricting process in Virginia, it merely reaffirmed a long line of precedent rejecting any misconceptions that Section 5 of the Voting Rights Act required the "maximization" of the number of minority districts, or the minority population within those districts.

Specifically, in 1995, in *Miller*, where the Department of Justice had refused to preclear a Georgia congressional redistricting plan until the number of majority African-American districts was increased, the Court still focused the strict scrutiny analysis on what was actually necessary to comply with Section 5, not what would ensure preclearance from the Department of Justice. 515 U.S. at 917-18. The Court held:

> It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Voting Rights Act. We do not accept the

> contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues.

Id. at 921-22. In *Miller*, the state surely was acting reasonably, following two objections from the Department of Justice, to ensure preclearance. But compliance with Section 5 is the correct inquiry for a reviewing court to pursue, not ensuring preclearance, and compliance does not require a maximization of the number of majority-minority districts. *Id.* at 925.

Likewise, in the 1996 *Vera* case, the Court rejected Texas' contention that compliance with Section 5 required it to increase the black voting age population (hereinafter "BVAP") in a congressional district that elected an African-American representative from 35.1% BVAP to 50.1% BVAP. 517 U.S. at 983. The Court explicitly rejected the argument that Section 5 could be used to justify not only maintenance, but substantial augmentation, of the African-American population percentage in the congressional district challenged as a racially gerrymander. *Id.* Indeed, the state had shown no basis for concluding that the increase to a 50.9% African-American population in 1991 was necessary to ensure non-retrogression. *Id.* Thus, even without the clarification of *ALBC*, it should have been clear to the General Assembly that Section 5 did not require the Commonwealth to either mechanically maintain the BVAP in Congressional District 3, nor raise it to 56.3% BVAP.

b. Congressional District 3 Was Not Narrowly Tailored to Advance a Compelling Governmental Interest

Under strict scrutiny, the state must meet a heavy burden of justification in demonstrating "that its [racial classification] has been structured with precision and is tailored narrowly to serve legitimate objectives and that it has selected the less drastic means" for effectuating its objectives. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *see also, Fisher v. Univ. of Tex.*, 570 U.S. ___, 133 S. Ct. 2411, 2420 (2013). A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression. *Vera*, 517 U.S. at 983. As discussed in detail above, *infra* Section III(a), that is exactly what happened here. Virginia did not properly interpret the demands of Section 5 compliance, and applied a mechanical 55% requirement. That alone warrants the conclusion that the district is not narrowly tailored. Additionally, the burden of production shifts to the defending party to demonstrate that the plan was narrowly tailored. *Shaw II*, 517 U.S. at 908. Neither Appellants, nor the state defending in the court below, put on any affirmative evidence of narrow tailoring; additionally, both acknowledged that the legislature performed no racially polarized voting analysis. *Page II*, 2015 U.S. Dist. LEXIS 73514, *52-57. As such, as a matter of law, the decision below must be affirmed.

The Court has given jurisdictions ample advice as to what kinds of districts might run afoul

of the narrow tailoring requirement. In *Vera*, the Court condemned:

> districts are bizarrely shaped and far from compact, [where] those characteristics are pre-dominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy. District 30, for example, reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district, and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race as a proxy to further neighboring incumbents' interests. *These characteristics defeat any claim that the districts are narrowly tailored.*

Vera, 517 U.S. at 979 (internal citations omitted) (emphasis added). Additionally, in *Shaw II*, the Court explained why North Carolina's grossly non-compact Congressional District 12 was not narrowly tailored, stating:

> if a geographically compact, cohesive minority population lives in south-central to southeastern North Carolina, as the Justice Department's objection letter suggested, District 12 that spans the Piedmont Crescent would not address that § 2 violation. ... District 12

> would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish the goal.

Shaw II, 517 U.S. at 917. Thus, non-compactness condemns under strict scrutiny a district drawn for racial reasons.

In drafting the 2012 congressional redistricting plan, the General Assembly failed to consider the extent to which black voters were currently able to elect the candidates of their choice, choosing instead to inflexibly and mechanically increase BVAP in the challenged districts despite decades of increased participation by black voters and the repeated success of candidate of choice of black voters. It also failed to examine whether more compact districts could be drawn that would still satisfy the Voting Rights Act. Congressional District 3 is not narrowly tailored to advancing a compelling governmental interest.

Additionally, what the General Assembly has done in this case is precisely the kind of blunt, non-narrowly-tailored use of mechanical racial quotas that the Supreme Court has also rejected in the educational setting. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court clarified further how a racial classification system could avoid falling into a "quota" trap. 539 U.S. at 334. The Court explained that race may only be used, constitutionally, in a "flexible" and "nonmechanical" way because equal protection requires "individualized assessments." *Id.*

Those individualized assessments save legislative action subjected to strict scrutiny.

Given this long line of precedent urging the minimization of racial considerations in redistricting, what would a narrowly tailored construction of Congressional District 3 have looked like? Constitutional compliance with Section 5 of the Voting Rights Act back in 2011 and 2012, when the enacted plan was drawn, simply required that the General Assembly follow the straightforward Section 5 guidance issued by the Department of Justice on February 9, 2011. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 27 Fed. Reg. 76, 7470-73 (Feb. 9, 2011). "In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* at 7470.

Constitutionally-acceptable compliance would have first required an identification of districts in which minority voters had the ability to elect their candidate of choice. *Id.* at 7471. In the congressional plan, the only such district was Congressional District 3, which was a district in which African-American voters had the demonstrated ability to elect their candidate of choice. Then, the legislature would have needed to examine the racial composition and shape of the

benchmark district. Given that Congressman Scott, in the last six elections prior to the 2012 redistricting process, ran unopposed in three of the elections, and won 70% of the vote in the 2010 election, *Page II*, 2015 U.S. Dist. LEXIS 73514, *55, there could have been no credible concern that the ability of black voters to elect their candidate of choice was at risk, even at 53.1%. As such, the General Assembly should have attempted to draw a more compact version of Congressional District 3—one that more strictly complied with the state constitutional demands that districts be compact and contiguous. Va. Const. art. II, § 6. After having drawn such an exemplar map or maps, or, even more simply, having received alternative maps in the legislative process, the legislature could have performed a simple functional analysis to determine whether the exemplar district would preserve the ability of black voters to elect their candidate of choice. That process—attempting to draw a district that more faithfully adhered to neutral, non-racial redistricting criteria—would have satisfied the jurisdiction's duty to narrowly tailor its use of race in drawing Congressional District 3, and it would not have required the Commonwealth to determine the precise point at which a district loses its ability to elect the candidate of choice of minority voters. *ALBC*, 135 S. Ct. at 1273-74. And had such an exemplar map indicated that black voters did not retain the ability to elect their candidates of choices in the more compact district, then the state likely would have had the "strong basis in evidence to use racial classifications" in the redrawing of the congressional districts. *Id.* at 1274.

CONCLUSION

Racial assumptions absent a local analysis of what current voting conditions actually require in order to prevent retrogression are antithetical to the promises of the Fourteenth Amendment, and regress, rather than progress, race relations in the political realm. This is contrary to the very purpose of the Voting Rights Act of 1965.

For the reasons detailed above, *Amicus* respectfully urges this Court to uphold the decision below.

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Respectfully submitted,

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